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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1022.

THE NEWPORT LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEWPORT, A. S. BERRY, MAYOR, ET AL.

IN ERROR TO THE COURT OF APPEALS FOR THE STATE OF KENTUCKY.

FILED SEPTEMBER 28, 1893.

(15,406.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1893.

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1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 4th day of March, 1893—W. S. Pryor, Jos. H. Lewis, and J. H. Hazlerigg, judges.

CITY OF NEWPORT, A. S. BERRY, Mayor, and P. J. RYAN and Others, Members of the Board of Councilmen of the City of Newport, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee.

Be it remembered that heretofore, to wit, on the 18th day of September, A. D. 1891, the appellants, The City of Newport and others, by counsel, filed a transcript in the office of the clerk of the Kentucky court of appeals in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs.
CITY OF NEWPORT.
DUEBER LIGHT CO.
vs.
2 NEWPORT LIGHT CO.
Consolidated Cases.

Pleas before the honorable judge of the Louisville law and equity court, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned, wherein Newport Light Co. is plaintiff and City of Newport, A. S. Berry, mayor, and P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, Wm. Cassidy, Jacob Smith, Geo. Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, & Benj. Keim, members of the board of councilmen of the city of Newport, are defendants.

Be it known that heretofore, to wit, at a court held for the court aforesaid on the 7th day of July, 1891—

NEWPORT LIGHT CO.
vs.
CITY OF NEWPORT.
#1607.

DUEBER LIGHT CO.
vs.
NEWPORT LIGHT CO.
#1606.

Came the Newport Light Company, by Carlisle, counsel, and filed the affidavit of John A. Williamson and three exhibits herein. And on its motion, by said counsel, a rule is awarded it against

City of Newport, A. S. Berry, William Cassidy, James E. McCracken, John Halloran, Michael Donelan, Edward Enneking, George Tippenhauer, John Schnorr, James Knoblock, B. W. Keim, Phillip J. Ryan, James Smith, James Dunnigan, John G. Wall, and J. H. Egelston, returnable 13th inst., to show cause, if any they have or can, why they shall not be punished for contempt of court.

3 Said affidavit is in the words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs.
CITY OF NEWPORT.
DUEBER LIGHT CO.
vs.
NEWPORT LIGHT CO.
} Consolidated Cases.

Affidavit.

John A. Williamson says he is the president of the Newport Light Company, and that on the 23rd day of April, 1891, the city of Newport, by its mayor and board of councilmen, made and entered into a contract with the Suburban Electric Illuminating, Heating and Power Company, by which the said company undertook and agreed to light the streets, alleys, and public places in said city with electricity for the term of fifteen (15) years, and the city agreed to pay for the same at the prices set forth in said contract, a certified copy of which is filed herewith as part hereof, marked "A," and he says that on the 23rd day of April, 1891, the said mayor and board of councilmen passed a resolution declaring that the city of Newport would "discontinue the use of lamp posts now in use for both gas and gasoline and the lights thereby furnished on and after July 1st, 1891," and that the city clerk be directed to notify the Newport Light Company thereof, a certified copy of which resolution is filed herewith, marked "B."

4 Affiant says that in pursuance of said resolution the city clerk did, on the 29th day of April, 1891, notify the Newport Light Company of the passage of the same and requested the said light company to send the city a statement of the original cost of its lamp posts, including the requisite fixtures therefor. He says that on the 1st day of July, 1891, the said Electric Illuminating, Heating and Power Company commenced to furnish electric light under said contract and is still furnishing the same, and that on the 30th day of June, 1891, the city of Newport attempted to tender to the Newport Light Company the sum of nine thousand four hundred and five (89,405), which said city claims was the original cost and value of the lamp posts and the fixtures belonging to the Newport Light Company, but which affiant says was not and is not the true value thereof. Affiant says that the said city of Newport is by the reasons aforesaid attempting to annul and set aside the con-

tract made between said city and the Newport Light Company on the — day of June, 1880, on file in these causes, and is threatening to discontinue the use of gas and gasoline under said contract or to pay for the same, although the said Newport Light Company has complied in every respect with all the terms and conditions of said contract, and is still doing so; all of which affiant says is in violation of the perpetual injunction granted in these actions and in contempt of the authority of this court. Affiant says that A. S. Berry was at the time said contract was made with the said Suburban Electric Illuminating, Heating and Power Company and is now mayor of the said city of Newport, and the following-named persons *was* then and ever since then have been and are now members of the board of councilmen, to wit, William Cassidy, James E. McCracken, John Halloran, Michael Donelan, Edward Enneking, George Tippenhauer, John Schnorr, James Knobloch, B. W. Keim, *Phippip* J. Ryan, James Smith, James Dunnigan, John G. Wall, and J. H. Egelston; and the Newport Light Company says that a rule be forthwith issued against all said parties requiring them to show cause why they and each of them should not be attached and punished for a contempt of this court.

John A. Williamson says that he is the president of the Newport Light Company, and that the statements contained in the foregoing affidavit are true.

JOHN A. WILLIAMSON.

Sworn to before me by John A. Williamson this 6th day of July, 1891.

HENRY E. YOUTSEY,
Examiner in and for Campbell Co., Ky.

Said exhibits are in the words and figures as follows, to wit:

COUNCIL CHAMBER,
NEWPORT, KY., *April* 23, 1891.

The board of councilmen met, with Mayor A. S. Berry in the chair. The roll was called and all the members notes present.

Mr. Wall offered the following resolution, viz:

Be it resolved, That the accompanying contract between the city of Newport and the Suburban Electric Illuminating, Heating and Power Company for lighting the city by electricity be entered into by the city, and that the mayor be, and he is hereby, directed to execute the same on behalf of the city, and that the city discontinue the use of the lamp posts now in use for both gas and gasoline and the gas-light thereby furnished on and after July 1st, 1891, and that the city clerk be directed to notify the Newport Light Company thereof, and request that it send the city a statement of the original cost of the lamp posts, including the requisite fixtures thereof. Said contract referred to is as follows, viz:

Whereas the streets and public places of the city of Newport, Kentucky, are now being lighted by gas furnished by the Newport Light Company in lamp posts owned by the said Newport Light Com-

pany; and whereas, under the terms of the contract between the said city and said light company, said city may discontinue said lamp posts by paying to said light company, the original costs of the lamp posts, including *its* requisite fixtures; and whereas the said city of Newport is desirous of using electric lights in said streets and public places of the city at approximately the same cost to the city as the gas-light would be;

And whereas the Suburban Electric Illuminating, Heating and Power Company of Newport, Kentucky, is desirous of furnishing the said city with electric light, and is willing to assume the payment of the contract price for the lamp posts and their requisite fixtures that may be discontinued and take the same, and to save and hold the city harmless from the costs and expenses, including lawyers' fees, of any and all suits or actions in law or in equity that may be instituted against it by reason of the execution by it of this contract, and is also willing to supply said electric light at
7 approximately the same cost as gas-light would be under its present contract, the average cost of which for the last five years has been over twenty dollars per lamp post, which is equal to one hundred dollars per year per 2,000 C. P. arc light, one of which displaces five lamp posts, at which price the said Suburban Company is willing to furnish the light, turning it on and off according to the schedule now in force with the Newport Light Company:

Now, therefore, this contract, entered into this 23rd day of April, 1891, by and between the city of Newport, a municipal corporation in the county of Campbell and State of Kentucky, party of the first part, and the Suburban Electric Illuminating, Heating and Power Company of Newport, Campbell county, Kentucky, a corporation created by an act of the General Assembly of said State, party of the second part, witnesseth:

That the party of the second part, for and in consideration of the covenants and agreements of the party of the first part, does hereby agree, contract, and covenant to and with the party of the first part that it will:

First. At and for the price and cost hereinafter agreed to be paid by the party of the first part, erect, maintain, clean, repair, light or turn on, and extinguish or turn off one hundred and five electric arc lights of 2,000 C. P. (commercial) each at the places in the party of the first part indicated by the stars on the hereunto attached map on the plat of said party of the first part; which map or plat is made a part of this contract as fully as if incorporated herein, and is identified by the signatures and seals of the parties
8 hereto, and also furnish current of electricity sufficiently to keep them continuously lighted.

The light shall be turned on and off as follows:

	Turn on.	Turn off.
January 1st to 10th, inclusive	5.00 p. m.	6.00 a. m.
" 11th to 20th, "	5.15 "	6.00 "
" 21st to 31st, "	5.30 "	6.00 "
February 1st to 10th, "	6.00 "	6.00 "
" 11th to 20th, "	6.00 "	5.45 "
" 21st to 28th, "	6.15 "	6.30 "
March 1st to 10th, "	6.30 "	5.15 "
" 11th to 20th, "	7.00 "	5.00 "
" 21st to 31st, "	7.00 "	5.00 "
April 1st to 10th, "	7.30 "	4.45 "
April 11th to 20th, "	7.30 "	4.30 "
" 21st to 30th, "	7.45 "	4.00 "
May 1st to 10th, "	7.45 "	4.00 "
" 11th to 20th, "	7.45 "	3.45 "
" 21st to 31st, "	7.45 "	3.30 "
June 1st to 10th, "	8.00 "	3.00 "
" 11th to 20th, "	8.00 "	3.00 "
" 21st to 30th, "	8.00 "	3.00 "
July 1st to 10th, "	8.00 "	3.00 "
" 11th to 20th, "	8.00 "	3.00 "
" 21st to 31st, "	7.45 "	3.00 "
August 1st to 10th, "	7.30 "	3.30 "
" 11th to 20th, "	7.15 "	4.00 "
" 21st to 31st, "	7.00 "	4.15 "
9		
September 1st to 10th, "	6.45 "	4.15 "
" 11th to 20th, "	6.30 "	4.30 "
" 21st to 30th, "	6.15 "	4.45 "
October 1st to 10th, "	6.15 "	4.45 "
" 11th to 20th, "	6.00 "	5.00 "
" 21st to 30th, "	5.45 "	5.15 "
November 1st to 10th, "	5.30 "	5.30 "
" 11th to 20th, "	5.30 "	5.30 "
" 21st to 30th, "	5.15 "	5.45 "
December 1st to 10th, "	5.00 "	6.00 "
" 11th to 20th, "	5.00 "	6.00 "
" 21st to 31st, "	5.00 "	6.00 "

except on nights of full moon and two nights before and two nights after said nights, when it will not be turned on unless rainy or very cloudy weather, when the schedule will be observed. The chief of police of the party of the first part or such other officer of the party of the first part as it may from time to time indicate shall be the judge of whether it is rainy or very cloudy weather, and upon his notice to the party of the second part that it is necessary the party of the second part shall turn on the lights according to the schedule, and if not so turned on after such notice there shall be a deduction in the rate per month for the hours the lamps should per schedule be giving light, to be deducted from the next monthly bill.

Second. Take, remove, and pay for all the lamp posts, including their requisite fixtures, in use for lighting the streets and public places in the party of the first part, belonging to the Newport Light Company, which the party of the first part may discontinue. Payment shall be made to the party of the first part by the party of the second part in such amounts and at such times as it may be required to pay the said Newport Light Company for the lamp posts so discontinued, and the lamp posts shall be removed at the sole cost of the party of the second part and become the property of the party of the second part.

Third. Pay all costs of court and expenses, including attorney's fees, in any actions and suits that may be instituted by the Newport Light Company against the party of the first part which may be caused by the execution of the contract by the party of the first part. The attorneys, however, who are thus to be paid are to be selected by the party of the second part.

Fourth. Change the location of any of the arc lights supplied by the party of the second part as may be directed by the party of the first part, without cost or expense to the party of the first part, and also to furnish all additional arc lights which the party of the first part may order or direct, which shall be 2,000 C. P. (commercial) and shall be erected, maintained, cleaned, repaired, supplied with electric current, and turned off and on as those herein contracted for and at no greater cost.

Fifth. Execute with good and approved security a bond in the penal sum of ten thousand dollars, conditioned for the faithful performance of this contract.

11 And the party of the first part, for and in consideration of the foregoing covenants and agreements of the party of the second part, does hereby agree, contract, and covenant to and with the party of the second part that it will promptly at the end of each and every month pay to the party of the second part the sum of eight $\frac{33}{100}$ dollars for each arc light herein contracted for and erected and in use in the said party of the first part, less a reduction at the said rate for the time any lamp fails to furnish light during the hours required by the schedule hereinbefore set forth.

It is mutually agreed that this contract is to continue in full force for the full term of fifteen years from the date hereof, and that all the arc lamps indicated on the hereunto attached plat or map are to be furnishing light on or before the first day of July next, unless enjoined from so doing; in which instance in sixty days after the final dissolution of the injunction.

In witness whereof the party of the first part, by its mayor, and pursuant to the resolutions of the board of councilmen, and the party of the second part, by its president, and pursuant to the resolutions of its board of directors, have hereunto set their names and affixed their seals the day and year first above written.

SUBURBAN ELECTRIC ILLUMINATING,
HEATING AND POWER COMPANY,
By H. M. HEALY, *President.* [SEAL.]
THE CITY OF NEWPORT,
By A. S. BERRY, *Mayor.* [SEAL.]

12 All which the chair declared adopted by the following vote, viz: Yeas—Cassidy, Egelston, Enneking, Keim, Knoblock, McCracken, Ryan, Smith, Wall—9. Nays—none. Not voting—Dunnigan, Halloran, Donelan, Schnoor, Tippenhauer—5. After the vote was announced Messrs. Dunnigan and Halloran voted yea, there being no objection to the change.

A true copy.

Attest: M. J. COSTIGAN, *City Clerk.*

[SEAL OF CITY.]

Attest: M. J. COSTIGAN, *City Clerk.*

City of Newport, city clerk's office.

NEWPORT, KY., *April 29th*, 1891.

Newport Light Company, Newport, Kentucky:

The mayor and board of councilmen of the city of Newport at its last meeting passed a resolution including the following: "That the city discontinue the use of lamp posts now in use for both gas and gasoline and the gas-light thereby furnished on and after July 1st, 1891, and that the city clerk be directed to notify the Newport Light Company thereof and request that it send the city a statement of the original cost of the lamp posts, including the requisite fixtures thereof." In compliance with the said resolution I now, on behalf of the city of Newport, notify you that on and after the 1st of July, 1891, the city will discontinue the use of lamp posts, both gas and gasoline, and will discontinue the gas-light thereby furnished.

13 You will at your earliest convenience send me for the city a statement of the original cost of those lamp posts, including the requisite fixtures thereof.

Respectfully, M. J. COSTIGAN, *City Clerk.*

A true copy.

Attest:

[SEAL.] M. J. COSTIGAN, *City Clerk.*

To the mayor and board of councilmen of the city of Newport:

Your communication dated April 20th, 1891, notifying the Newport Light Company that on and after July 1st, 1891, the city of Newport "will discontinue to use the lamp posts, both gas and gasoline, and will discontinue the gas-light thereby furnished," was duly received by said company, and in response thereto the Newport Light Company hereby notifies the mayor and board of councilmen of the city of Newport that it will continue to use the lamp posts heretofore erected in said city and to furnish gas and gasoline under and in accordance with the terms of the ordinance and contract of June 3rd, 1880, and that in case the said city shall, on the first day of July, 1891, or at any other time before the expiration of said contract, attempt to discontinue or interfere with the use of said lamp posts or refuse to receive the gas furnished for lighting the streets, alleys, and public places, as provided in said contract, the

light company will proceed in the Louisville law and equity court to have the mayor and members of the board of councilmen punished for a violation of the perpetual injunction heretofore granted
14 by said court, and will proceed otherwise against said mayor and the members of the board of councilmen individually for the recovery of such loss or damage as may be sustained by reason of such unlawful interference with the business of the said light company.

May 21st, 1891.

THE NEWPORT LIGHT COMPANY,
By JNO. G. CARLISLE AND
NELSON & DESHA, *Att'ys.*

Executed the within notice this 19th day of June, 1891, on A. S. Berry, mayor of the city of Newport, by delivering to him a copy hereof; and executed this 19th day of June, 1891, on T. P. Ryan, John Halloran, M. Donelan, James Knob*laugh*, John Wall, and Wm. Cassidy, members of the board of councilmen of the city of Newport, by delivering to each of them a copy hereof; and executed this 20th day of June, 1891, on Jacob Smith, a member of the board of councilmen of the city of Newport, by delivering to him a copy hereof; and executed this 22nd day of June, 1891, on Geo. Tippenhauer, a member of the board of councilmen of the city of Newport, by delivering him a copy hereof; and executed this 23rd day of June, 1891, on Ed. Enneking, a member of the board of councilmen of the city of Newport, by delivering to him a copy hereof; and executed this 23rd day of June, 1891, on James Dunnigan, a member of the board of councilmen of the city of Newport, by delivering him a copy hereof; and executed this 29th day of June, 1891, of J. H. Eggleston and James E. McCracken, members of the board of councilmen of the city of Newport, by delivering to each of them a copy hereof; and executed on John
15 Schnorr, a member of the board of councilmen of the city of Newport, this 30th day of June, by delivering to him a copy thereof; and executed this 2nd day of July, 1891, on Benj. Keim, a member of the board of councilmen of the city of Newport, by delivering a copy hereof to him.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

The contract marked "Exhibit A," referred to in the foregoing affidavit, is in the words and figures as follows, to wit:

Passed June 3rd, 1880.

An ordinance further providing for the lighting of the city of Newport, Ky.

SECTION 1. Be it ordained by the mayor and board of councilmen of the city of Newport: That from and after the passage of this ordinance there shall be and is hereby granted unto the Newport Light Company and their successors, the exclusive privilege of

using any or all of the streets, lanes, commons, alleys, and public places of the city for the purpose of laying pipes to convey and supply gas to the said city of Newport and others, this privilege is granted for the term of twenty-five years from the date hereof, and until the city shall give said company twelve (12) months' notice to terminate the same and embraces the right of said company to use said streets, lanes, alleys, and public grounds for establishing and conducting said business.

16 SECTION 2. That the said pipes etc. shall be so placed as not to interfere with the water, drain or sewer pipes of said city and whenever said light company or their successors shall desire to open any of said streets, lanes, alleys, etc. for the purpose of laying down pipes it shall be their duty to give at least five days' notice to the city previous to the commencement of the work. The company shall not during the progress of the work unnecessarily obstruct public travel, and shall within a reasonable time not exceeding thirty days after the pipes are laid in the streets etc. repair said streets in such manner as may be satisfactory to the city where the same have been disturbed by such work of the company, and that in case of settlement of said streets within sixty days thereafter, the said Newport Light Company shall repair and put the streets in the same condition as before disturbed.

SECTION 3. The said Newport Light Company shall furnish to the city of Newport upon the several streets, lanes, alleys and public places of the city of Newport in which pipes are laid, a continuous supply of gas (equal in quality to Cincinnati gas) in such quantities as the said city may require and direct for the use of the public street lamps and public buildings owned by the city or ordered by the board of councilmen at the rate of $1.20 per one thousand cubic feet, said board of councilmen shall determine what size burners shall be used so that they shall not burn less than four feet to the hour for each, and the lighting thereof shall be regulated in such manner as may from time to time be directed by the board of council- of the city of Newport.

17 The amount of gas consumed by public street lamps and in public buildings owned by the city to be ascertained by the customary meter measurement, gas shall be furnished to the citizens for their private consumption at the following rates, viz: At $1.90 per thousand cubic feet with 5 % off for cash within ten days for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet with 5 % off for cash within ten days for the period of five years from June 11th, 1887; at $1.75 per thousand cubic feet with five per cent. off for cash within ten days for the period of fifteen years from June 11th, 1892.

SECTION 4. That all public street lamps, lamp posts, and other requisite fixtures appertaining thereto shall be furnished by and at the expense of said Newport Light Company and erected at such times, points and in such numbers (where the main pipes are laid) as the city may direct, said lamps to be lighted upon their erection and continued in use thereafter as herein provided, and whenever the said city shall determine that a gas post shall be removed from

one point to another or be discontinued, the said Newport Light Company shall remove the same at the *at the* expense of said city for such removal, and if discontinued, the same including requisite fixtures for the lamp post shall be purchased by said city at their original cost.

Public street lamps to be cleaned, lighted and kept in repair at the expense of said city and if said city should at any time desire to have public street lamps erected at any of the public build-
18 ings, or to light any street, lane, alley etc. and the said Newport Light Company should refuse to extend the pipes to such situations in the city, then the said city shall have the privilege of extending the pipes at their own cost, and to order the erection of such number of public street lamps for the purpose aforesaid, as they may deem proper and the said public street lamps shall be erected upon the same conditions and furnished with gas upon the same terms as the other public street lamps of the city, and the main gas pipes so laid down shall not directly or indirectly be used for furnishing gas except for public street uses, nor shall other pipes be laid down along any part of streets so occupied by gas pipes laid down at the expense of the city until the whole amount so expended by the city in laying down said pipes be refunded to the city by said Newport Light Company and their successors, when the said pipes shall become the property of the said Newport Light Company, provided that the said company, if required or ordered so to do by said board of councilmen, shall lay down on such street or streets as *as* said board may designate not less than one thousand feet of main gas pipe annually.

SECTION 5. And whereas the existing contract of the city of Newport with the Covington Gas Light Company will expire on the 11th day of June, 1882, and by the terms of said contract the city council or those with whom they may contract to light the city thereafter, may purchase the pipes, lamp posts and fixtures, etc., of the Covington Gas Light Company in the city, the value of the same to be determined as provided in the ordinance of June
19 11th, 1857, entitled An ordinance providing for the lighting of the city of Newport, Ky., with gas. Now, therefore, in consideration of the undertakings of the said Newport Light Company, as stipulated in this ordinance the said right of purchase with all the privileges incident or relating thereto *are* hereby assigned, transferred, and vested in the said Newport Light Company in as full a manner as the same belong to the city of Newport, and the city of Newport hereby guarantees to said Newport Light Company the accomplishment of said purchase and transfer, and the said company hereby binds itself in consideration of said transfer to make said purchase as aforesaid and the said Newport Light Company is to light the city thereafter according to the stipulations and provisions of this ordinance.

SECTION 6. The said Newport Light Company and their successors reserve and shall have the right to remove any or all of their pipes and lamp posts, fixtures, and etc., when this contract expires, unless the same shall be removed, or the said city may purchase said pipes,

lamp posts, fixtures, etc. The value of the same to be ascertained by five disinterested persons residents of Kentucky two of whom shall be chosen by the city, two by the said Newport Light Company and the fifth by the four so chosen.

SECTION 7. Said company or their successors may adopt any other mode equal to gas for supplying light to the city and its inhabitants, etc., provided the same shall be done at no greater cost or expense to the city or consumers than the gas-light.

20 SECTION 8. The city is to pay in cash to said company for the gas consumed by it in the public lamps, public buildings and elsewhere as the quantity may be ascertained from the meters each month.

SECTION 9. The said Newport Light Company shall within fourteen days after the passage of this ordinance signify in writing its acceptance and thereupon the same shall become a binding contract between said company and the city, but upon failure of the company to accept the same then this ordinance may be repealed, provided further that said company shall within twenty days after the passage of this ordinance execute bond with good and approved surety to said city for the faithful performance of all its duties as herein enjoined.

And the strict compliance with all the terms, conditions and requirements of this ordinance.

This ordinance shall take effect from its passage.

And thereupon the clerk issued rule and 16 copies directed to the sheriff of Campbell county, Kentucky.

Said rule is in the words and figures as follows, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY
vs.
CITY OF NEWPORT.

DUEBER LIGHT COMPANY
vs.
NEWPORT LIGHT COMPANY.

To the sheriff of Campbell county, Greeting:

On motion of the Newport Light Company, by J. G. Carlisle, attorney, a rule was awarded it against the City of Newport,
21 A. S. Berry, William Cassidy, James E. McCracken, John Halloran, Michael Donelan, Edward Enneking, George Tippenhauer, John Schnorr, James Knobloch, B. W. Keim, Phillip J. Ryan, James Smith, James Dunnigan, John G. Wall, and J. H. Egelston, returnable July 13, 1891, to show cause, if any they have or can, why they should not be punished for contempt of court.

Witness John H. Weller, clerk of the Louisville chancery court

and *ex officio* clerk Louisville law and equity court, this 7th day of July, 1891.

JOHN H. WELLER, *Clerk*,
By JOHN M. O'NEILL, *D. C.*

The sheriff returned said rule with the following endorsement thereon:

Executed the rule hereto attached this 8th day of July, 1891, on John Halloran by delivering to him a copy thereof.

LOUIS BETZ, *Sh'ff*,
By JULE PLUMMBER, *D. S.*

Executed the rule hereto attached this 8th day of July, 1891, on Phillip J. Ryan, James Dunnigan, John C. Wall, Jacob Smith, and James E. McCracken by delivering to each of them a copy thereof, and executed this 9th day of July, 1891, on Wm. Cassidy, Michael Donelan, James Knobloch, John Schnorr, and Geo. Tippenhauer by delivering to each of them a copy thereof, and executed this 11th day of July, 1891, on J. H. Egelston and Edward Enneking by delivering to each of them a copy thereof, and executed this 9th day of July, 1891, on the City of Newport by delivering a copy thereof to Albert S. Berry, he being the mayor of said city and its
22 chief officer found in my county, and executed this 9th day of July, 1891, on A. S. Berry by delivering to him a copy thereof. B. W. Keim not found in my county this 11th day of July, 1891.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

At a court held for the court aforesaid on the 8th day of July, 1891—

NEWPORT LIGHT CO.
vs. } #1607.
CITY OF NEWPORT.

DUEBER LIGHT CO.
vs. } #1606.
NEWPORT LIGHT CO.

Came Newport Light Company, by Carlisle, counsel, and filed the affidavit of J. A. Williamson herein.

And on its motion a rule is awarded it against Jacob Smith, returnable 13th of July, 1891, to show cause, if any he has or can, why he shall not be punished for contempt of this court.

Said affidavit is in the words and figures as follows, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Plaintiff,
against
CITY OF NEWPORT, Defendant.

DUEBER LIGHT CO., Plaintiff,
against
NEWPORT LIGHT CO., Defendant.

The affiant, J. A. Williamson, says that he is the president of the Newport Light Company, and that by a clerical error in his
23 affidavit filed herein on the 7 day of July, 1891, the name of James Smith was included in the list of the members of the board of councilmen of the city of Newport, whereas he says that the name should have been Jacob Smith, who was at the times stated in said affidavit and atill is a member of said board. Wherefore the said Newport Light Company prays that a rule be issued against said Jacob Smith, returnable on the 13th day of July, 1891, to show cause why he should not be punished for a contempt of the order and judgment of this court.

J. A. Williamson says that he is president of the Newport Light Company, and that the statements contained in the foregoing affidavit are true.

JOHN A. WILLIAMSON.

Sworn to before me by J. A. Williamson this 8 day of July, 1891.

H. H. DEPUTY,
Examiner for Campbell County, Kentucky.

And thereupon the clerk issued rule and copy, directed to the sheriff of Kenton county, Kentucky.

Said rule is in the words and figures as follows, to wit:

Rule.

THE COMMONWEALTH OF KENTUCKY, *set:*

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs.
CITY OF NEWPORT.

DUEBER LIGHT CO.
vs.
NEWPORT LIGHT CO.

To the sheriff of Kenton county, Greeting:

On motion of Newport Light Co., by Carlisle, attorney, a
24 rule was awarded it against Jacob Smith, returnable July 13th, 1891, to show cause, if any he has or can, why he shall not be punished for contempt of this court.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk Louisville law and equity court, this 8th day of July, 1891.

JOHN H. WELLER, *Clk*,
By JOHN M. O'NEILL, *D. C.*

The sheriff returned said rule, with the following endorsement thereon:

Executed the within rule this 9th day of July, 1891, on Jacob Smith by delivering to him a copy thereof.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

At a court held for the court aforesaid on the 13th day of July, 1891—

NEWPORT LIGHT CO. *vs.* CITY OF NEWPORT. } #1607.

DUEBER LIGHT CO. *vs.* NEWPORT LIGHT CO. } #1606.

Came the defendants, The City of Newport and the Mayor and Board of Councilmen of the City of Newport, and by counsel filed exceptions and a demurrer to the affidavit of John A. Williamson herein, upon which the rules herein were issued.

Came Geo. Tippenhauer, John Schnoor, and Michael Donelan, by counsel, and filed a response to the rule against them, and said response was adjudged sufficient and the rule against them
25 was discharged.

Came the City of Newport and the mayor and members of the board of councilmen thereof and, without waiving their exceptions and demurrer this day filed, filed a response to the rule issued against them herein.

And came the Newport Light Company, by counsel, and filed a demurrer to each and every paragraph of said response.

And this action was heard and submitted on all exceptions and demurrers and on the whole case.

Said exceptions and demurrer are in the words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT, &C., Defendants,

and

DUEBER LIGHT CO., Plaintiff,
vs.
NEWPORT LIGHT CO., Defendant.

1. Respondents herein, City of Newport and the Mayor and Board of Councilmen of the City of Newport, now come and enter exceptions to the sufficiency of the allegations and statements of the affidavit of John A. Williamson, upon which the rules herein were issued, in that it does not necessarily follow from the statements of said affidavit that respondents or either of them have done
26 anything which is a contempt of this honorable court.

2. That said respondents now come and demur to said affidavit because it does not state facts sufficient to advise this court that its judgment or orders have been violated or disobeyed by respondents or either of them; and respondents and each of them disclaim having been guilty of any contempt to this honorable court.

THOMAS P. CAROTHERS,
T. F. HALLAM,
JOHN P. NEWMAN,
THOMAS F. HARGIS,
C. J. HELM,
Att'ys for Respon-ents.

Said response to rule by Geo. Tippenhauer and others is in the words and figures as follows, to wit:

Response to Rule.

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY, Plaintiff,
vs.
CITY OF NEWPORT, Defendant,

and

DUEBER LIGHT COMPANY, Plaintiff,
vs.
NEWPORT LIGHT COMPANY, Defendant.

The respondents George Tippenhauer, John Schnoor, and Michael Donelan, for answer to the rule issued herein against them to show cause why they should not be punished for contempt of court, respectfully answer and say that they have not at any time committed any act or failed or refused to perform any act the commission or

omission of which was or is contrary to the orders of this court or of any decree or judgment thereof.

27 Respondents each say that neither of them voted for the resolution of April 23rd, 1891, mentioned in the affidavit of John A. Williamson, upon which the said rule was issued, and that neither of them voted for the contract between the city and the Suburban Electric Illuminating, Heating and Power Company of the 23rd of April, 1891, also mentioned in said affidavit; that neither of them was party to, voted for, or participated in any way in the tender of the $9,405.00 mentioned in said affidavit.

That all the other members of the board of councilmen voted for the execution of said contract by the said city of Newport and for said resolution, and that eight of the members of said board voted in favor of said tender, and that it was not in the power of respondents or either of them to prevent by any action or vote upon their part the execution of said contract by said city or the passage of said resolution or the tender by the said city of said sum of money.

Wherefore they pray that they be discharged from the rule and that they have judgment against the Newport Light Company for their costs herein expended.

T. F. HALLAM,
JNO. P. NEWMAN,
THOS. P. CAROTHERS,
THOS. F. HARGIS, AND
CHAS. J. HELM,
Attorneys for Respondents.

George Tippenhauer, John Schnoor, and Michael Donelan say that all the statements of the foregoing response are true.

G. TIPPENHAUER.
JOHN SCHNOOR.
MICHAEL DONELAN.

28 Subscribed and sworn to by George Tippenhauer, John Schnoor, and Michael Donelan before me this 11th day of July, 1891.

CHAS. J. HELM,
Examiner, Campbell County, Kentucky.

Said response of the City of Newport, &c., is in the words and figures as follows, to wit:

Louisville Chancery Court.

NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT *et al.*, Defendants. } Consolidated Cases.

Response to Rule.

For response to the rule herein issued the 7th day of July, 1891, the City of Newport and the mayor and members of the board of councilmen thereof respectfully disclaim unto the court that the

matters and things specified in the affidavit filed herein July 7, 1891, or any of them are in violation of the perpetual injunction granted in these actions or in contempt of the authority of the court, and the respondent saith:

1. That the Newport Light Co. did not in these actions or either of them complain of any threat of in-ringement upon its alleged right except by contract with other then existing persons or corporations to supply light to said city by means of gas.

2. That these respondents were not by the decree enjoined from making any contract for lighting except by gas or in any other similar manner.

29 3. That they were not enjoined from making any contract for lighting except during the existence of the contract then in force with the Newport Light Co.

4. That they were enjoined from discontinuing the taking of gas from the Newport Light Co. for the lighting of said places only as to such quantities as might be required for that purpose according to the contract then in force between said parties. They say that from and after the first day of July, 1891, no gas was required for that purpose either according to said contract or otherwise.

5. That as to such discontinuance they were enjoined only for so long as said contract should remain in force.

6. That before the 19th day of March, 1887, the Newport Light Co. had brought its suit against the city of Newport in the Campbell circuit court to recover for the furnishing of lights to the streets, alleys, and other public places of said city and had recovered therein a judgment for $15,589.89, and in said action it was in issue, among other things, between said parties whether said city might lawfully discontinue the taking of gas from the Newport Light Co. either with or without paying the original cost of each lamp post, including requisite fixtures of same, furnished according to said contract, and whether the gas furnished by the Newport Light Co. was equal in quality to Cincinnati gas; that said judgment had not been paid except as to $1,500.00 thereof, which was realized by execution sale of the said city's poor-house farm, and has been appealed from by said city, and said issues were on said day pending in the court of appeals and undetermined; that on said day it
30 was by said city, through its mayor and board of councilmen, and by the Newport light Co., in compromise and settlement of all claims and litigation between said city and the Newport Light Co., contracted and agreed, among other things, that said city would pay the amount of said judgment without interest and the subsequently accrued bills of said light Co. to Feb'y 1, 1887, without interest, and less $1,000.00, being a total of $25,521.50 payable in monthly installments of $1,000.00 each, and that the city should dismiss said appeal, and that the lighting and extinguishing of the public street lamps thereafter (but without fixing any term) should be governed by a certain time-table therein set forth, and that when

said city should determine that a gas post should be discontinued the same, including the requisite fixtures for the posts, should be purchased by said city at their original cost; and respondents file herewith as part hereof a copy of said contract, and respondents say the said new contract was in force from said day until the doing of the several acts now complained of and was in lieu of the original contract wherein said injunction was decreed, and was a novation of the rights between said parties as to the lighting and discontinuance of lamp posts and lights.

7. Respondents further say that after the original power of the said city to provide for lighting was exhausted, as in these causes determined, and after said decree and after said substituted contract was made the General Assembly by an act entitled "An act to amend the charter of the city of Newport," approved the 17 day of April, 1890, invested said city with full power and authority to provide
31 for lighting its streets, &c., in any manner whatsoever; and the General Assembly by a certain other act entitled An act to incorporate the Edison Electric Illuminating, Heating and Power Co., approved the 9 day of April, 1890, and the amendatory act approved the 15 day of May, 1890, to said act changing the name from "Edison" to "Suburban," incorporated said company and conferred upon it power and authority to enter in and upon the streets and public places of the said city of Newport, and therein erect poles and stretch wires upon same along said streets for the purpose of supplying electric light, heat, and power to such persons and corporations, including the city of Newport, as might contract with it for same.

8. That the action of the city in making the contract with the Suburban Illuminating, Heating & Power Co., the passage of the resolution to discontinue the lamp posts, and the tender of the said $9,405.00, which are set forth in the affidavit of Jno. A. Williamson, filed herein, were done under the said acts of the legislature and the contract between the Newport Light Co. and the city of Newport.

Wherefore respondents ask that the rule against them be discharged and that they be ex*hono*rated from the charge of contempt of this honorable court, and that they have judgment against the Newport Light Co. for their costs herein expended.

THOMAS P. CAROTHERS,
T. F. HALLAM,
JOHN P. NEWMAN,
THOMAS F. HARGIS,
C. J. HELM,
Att'us for Respondents.

The affiant- Albert S. Berry, William Cassidy, James E McCracken, John Halloran, Edward Enneking, James Knobloch,
32 Phillip J. Ryan, James Dunnigan, John G. Wall, and J. H.

Egelston say that each and all of the allegations and statements in the foregoing response are true.

ALBERT S. BERRY.
WM. CASSIDY.
J. E. McCRACKEN.
JOHN HALLORAN.
JAMES KNOBLOCH.
PHIL. J. RYAN.
JAMES DUNIGAN.
JOHN G. WALL.
J. H. EGELSTON.
EDWARD ENNEKING.

Subscribed and sworn before me by all of the above-named parties this 13th day of July, 1891.

JAS. W. GARRISON,
Notary Public, Jeff. Co., Ky.

Subscribed and sworn to by J. H. Egelston before me this 13 day of July, 1891.

JOHN M. O'NEILL,
D. Clk Louis. Ch'y C't.

The contract referred to in the foregoing response is in the words and figures as follows, to wit:

CLERK'S OFFICE,
NEWPORT, KY., *March 19th*, 1887.

The board of councilmen met pursuant to adjournment, with Mayor M. V. Daly in the chair.

The roll called and all the members noted present.

* * * * * * *

The compromise offered by the Newport Light Co. for the settlement of all claims and litigation now pending was, on motion of Mr. Bleichner, accepted on call of the yeas and nays as follows: Yeas, Burwell, Blichner, Hahn, Halloran, Pagan, Ryan, Lurran, Tippenhauer, Willingford—9; nays, Allen, McNulty, Reuscher—3.

The said compromise is as follows:

33 Whereas the Newport Light Company has voluntarily proposed to reduce the price of gas to private consumers to (81.52) one dollar and fifty-two cents per 1,000 cubic feet from and after the first day of April, 1887, provided that a settlement of all the claims of said company against the city on the basis as heretofore proposed is effected:

Therefore be it resolved—

That the following basis of settlement, time-table, and proposed reduction of gas to private consumers be concurred in and agreed to by this board, and that the proper officers of the city are hereby directed to at once carry into effect all the provisions of said settlement.

SECTION 1. The city agrees to pay the Newport Light Co. the

said city should determine that a gas post should be discontinued the same, including the requisite fixtures for the posts, should be purchased by said city at their original cost; and respondents file herewith as part hereof a copy of said contract, and respondents say the said new contract was in force from said day until the doing of the several acts now complained of and was in lieu of the original contract wherein said injunction was decreed, and was a novation of the rights between said parties as to the lighting and discontinuance of lamp posts and lights.

7. Respondents further say that after the original power of the said city to provide for lighting was exhausted, as in these causes determined, and after said decree and after said substituted contract was made the General Assembly by an act entitled "An act to amend the charter of the city of Newport," approved the 17 day of April, 1890, invested said city with full power and authority to provide
31 for lighting its streets, &c., in any manner whatsoever; and the General Assembly by a certain other act entitled An act to incorporate the Edison Electric Illuminating, Heating and Power Co., approved the 9 day of April, 1890, and the amendatory act approved the 15 day of May, 1890, to said act changing the name from "Edison" to "Suburban," incorporated said company and conferred upon it power and authority to enter in and upon the streets and public places of the said city of Newport, and therein erect poles and stretch wires upon same along said streets for the purpose of supplying electric light, heat, and power to such persons and corporations, including the city of Newport, as might contract with it for same.

8. That the action of the city in making the contract with the Suburban Illuminating, Heating & Power Co., the passage of the resolution to discontinue the lamp posts, and the tender of the said $9,405.00, which are set forth in the affidavit of Jno. A. Williamson, filed herein, were done under the said acts of the legislature and the contract between the Newport Light Co. and the city of Newport.

Wherefore respondents ask that the rule against them be discharged and that they be ex*hono*rated from the charge of contempt of this honorable court, and that they have judgment against the Newport Light Co. for their costs herein expended.

THOMAS P. CAROTHERS,
T. F. HALLAM,
JOHN P. NEWMAN,
THOMAS F. HARGIS,
C. J. HELM,
Att'us for Respondents.

The affiant- Albert S. Berry, William Cassidy, James E McCracken, John Halloran, Edward Enneking, James Knobloch,
32 Phillip J. Ryan, James Dunnigan, John G. Wall, and J. H.

Egelston say that each and all of the allegations and statements in the foregoing response are true.

ALBERT S. BERRY.
WM. CASSIDY.
J. E. McCRACKEN.
JOHN HALLORAN.
JAMES KNOBLOCH.
PHIL J. RYAN.
JAMES DUNIGAN.
JOHN G. WALL.
J. H. EGELSTON.
EDWARD ENNEKING.

Subscribed and sworn before me by all of the above-named parties this 13th day of July, 1891.

JAS. W. GARRISON,
Notary Public, Jeff. Co., Ky.

Subscribed and sworn to by J. H. Egelston before me this 13 day of July, 1891.

JOHN M. O'NEILL,
D. Cl'k Louis. Ch'y C't.

The contract referred to in the foregoing response is in the words and figures as follows, to wit:

CLERK'S OFFICE,
NEWPORT, KY., *March 19th*, 1887.

The board of councilmen met pursuant to adjournment, with Mayor M. V. Daly in the chair.

The roll called and all the members noted present.

* * * * * * *

The compromise offered by the Newport Light Co. for the settlement of all claims and litigation now pending was, on motion of Mr. Bleichner, accepted on call of the yeas and nays as follows: Yeas, Burwell, Blichner, Hahn, Halloran, Pagan, Ryan, Lurran, Tippenhauer, Willingford—9; nays, Allen, McNulty, Reuscher—3.

The said compromise is as follows:

33 Whereas the Newport Light Company has voluntarily proposed to reduce the price of gas to private consumers to ($1.52) one dollar and fifty-two cents per 1,000 cubic feet from and after the first day of April, 1887, provided that a settlement of all the claims of said company against the city on the basis as heretofore proposed is effected:

Therefore be it resolved—

That the following basis of settlement, time-table, and proposed reduction of gas to private consumers be concurred in and agreed to by this board, and that the proper officers of the city are hereby directed to at once carry into effect all the provisions of said settlement.

SECTION 1. The city agrees to pay the Newport Light Co. the

amount of the judgment without interest and the bills of the Newport Light Co. which have accrued since to date, viz: February 1st, 1887 without interest less ($1,000) one thousand dollars, payments to be made of ($1,000) on each month until total is paid without interest. The first payment to be made on the first day of April 1887.

It is agreed that the amount of judgment is.....	15,589 89
Less poor-house farm levied on and brought.....	1,500 00
Leaving a net balance of	14,089 89
To which add amount of gas bills &c. as above up to February 1st, 1887 less ($1,00–) one thousand dollars...	11,431 61
Making total indebtedness.....	25,521 50

SECTION 2. The city agrees to dismiss the appeal in the court of appeals each party to pay its own costs.

34 SECTION 3. The light company to stay the attachment in the Campbell chancery court which was brought to enforce collections of the above judgment until such time as the claims now pending and due are paid in conformity with the agreement when the light company is to release the attachment.

SECTION 4. The light company upon settlement of the claims as above agrees to release and cause to revert to the city the poor-house farm if the city so desires upon payment by said city to said light company of the exact amount paid by said light company for said farm.

SECTION 5. The city agrees to instruct the city engineer or other city officials to see that the meters in the public buildings and on the lamp posts are correct and that on the last day of each month to further see that the statements of the same are properly taken by the light company and to verify the bills of said company. Said bills to be referred to him for that purpose.

SECTION 6. The light company to concede the right of the city under the contract to designate the size of the burners not however to be less than (4) four-foot burners.

SECTION 7. The lighting and extinguishing of the public street lamps in the future shall be governed by the following time-table:

Month.	Begin to light.	Begin to extinguish.
Jan. 1st to 10th	5 p. m.	6 a. m.
" 11th " 20th	5.15 "	6 "
21 " 31st	5.30 "	6 "
35		
Feb. 1 to 10	6 p. m.	6 "
11 " 20	6 "	5.45 "
21 " 28	6.15 "	5.30 "
March 1 " 10	6.30 "	5.15 "
11 " 20	7 "	5 "
21 " 31	7 "	5 "
Apr. 1 " 10	7.30 "	4.45 "
11 " 20	7.30 "	4.30 "
21 " 30	7.45 "	4 "
May 1 " 10	7.45 "	4 "
11 " 20	7.45 "	3.45 "
21 " 31	7.45 "	3.30 "
June 1 " 10	8 "	3 "
11 " 20	8 "	3 "
21 " 31	8 "	3 "
July 1 " 10	8 "	3 "
11 " 20	8 "	3 "
21 " 31	7.45 "	3 "
Aug. 1 " 10	7.30 "	3.30 "
11 " 20	7.15 "	4 "
21 " 31	7 "	4.15 "
Sept. 1 " 10	6.45 "	4.15 "
11 " 20	6.30 "	4.30 "
21 " 30	6.15 "	4.45 "
36		
Oct. 1 " 10	6.15 "	4.45 "
11 " 20	6 "	5 "
21 " 31	5.45 "	5.15 "
Nov. 1st " 10	5.30 "	5.30 "
11 " 20	5.30 "	5.30 "
21 " 30	5.15 "	5.45 "
Dec. 1 " 10	5 "	6 "
11 " 20	5 "	6 "
21 " 31	5 "	6 "

No lighting on night of full moon and two nights before and two nights after full moon except in case of rainy or very cloudy weather.

The amount of gas consumed to be paid for by meter measurement and that when the city shall determine that a gas post shall

be removed from one point to another or to be discontinued, the gas company shall remove the same at the expense of the city and if discontinued the same including the requisite fixtures for the posts shall be purchased by said city at their original cost.

SECTION 8. Said Newport Light Company for the purpose of meeting the views of many of its customers voluntarily propose that from and after the first day of April, 1887 for the following five years will reduce the price of gas to ($1.60) one dollar and sixty cts. per 1,000 cubic feet with five per cent. off for cash if paid
37 within ten days after the first day of each month, making the net cost ($1.52) one dollar and fifty-two cts. per (1,000) one thousand cubic feet but this action of said company shall not be understood or made use of in any way to effect the existing contract of said company with the city of Newport and to be construed as a voluntarily act on the part of said light Co. and it is hereby understood and agreed that said voluntary act of the said Newport Light Co. does not waive any existing rights or privileges granted them in their existing contract.

Accepted by

NEWPORT LIGHT COMPANY,
By JOHN A. WILLIAMSON, *President.*

Witnessed by—
M. J. COSTIGAN.
LOUIS CONSTANS.

On motion, the compromise was referred to the committee on printing, to be printed in the annual reports.

On motion, the city engineer was ordered to examine and test the meters each month.

On motion, the city clerk was ordered to notify the Newport Light Company to not put more than (4) four-*feet* burners on the public lamps.

On motion, the city clerk was ordered to draw up an official copy of the proceedings of this meeting and the mayor to serve the same on the Newport Light Co.

On motion, council adjourned.

M. V. DALY, *Mayor.*

Attest: M. J. COSTIGAN, *City Clerk.*

I herewith certify that the above is a true and correct copy as taken from the minutes of the board of councilmen of Newport, Ky., of date March 19th, 1887.

38 [SEAL.] M. J. COSTIGAN, *City Clerk.*

The original petition of The Newport Light Co. *vs.* City of Newport, ≠ 1607, filed on the 19th day of February, 1885, is in the words and figures as follows, to wit:

Campbell Chancery Court.

THE NEWPORT LIGHT COMPANY, Plaintiff,
vs.
THE CITY OF NEWPORT, Defendant. } Petition in Equity.

The plaintiff says that it is a body corporate and politic under the laws of this State, with power, among other things, to sue and be sued, contract and be contracted with, and to furnish any city, town, district, corporation, public institutions, manufacturing establishment, or private premises with gas or other light for such time and upon such terms as may be agreed upon by the parties, and, for the purposes of fair business, to acquire by purchase or other lawful mode such property, real or personal, as it might require in its business and to dispose thereof.

It says that the def't is a municipal corporation under the laws of this State, and with authority under its charter to provide for the lighting of its streets, lanes, commons, alleys, and public buildings or places with gas; that in virtue thereof the def't on the 3rd day of June, 1880, made and entered into a contract with pl't'ff whereby it was mutually stipulated, covenanted, and agreed, among other things not material to be here noticed, that from and after the 11th day of June, 1882, the pl't'ff and its successors should have the exclu-
39 sive privilege of using any or all of the streets, lanes, commons, alleys, and public places of said city for the purpose of laying pipes to convey and supply gas to it and others, said privilege to be so enjoyed and used for the term of twenty-five years from June 11th, 1882, and until the def't should give pl't'ff twelve months' notice to terminate same, and expressly embracing the right of pl't'ff to use said streets, lanes, alleys, and public places or grounds for establishing and conducting said business; that pl't'ff should furnish to def't, upon its several streets, lanes, alleys, and public places in which pipes were so laid, a continuous supply of gas, equal in quality to Cincinnati gas, in such quantities as the def't might require and direct for the use of the public street lamps and public buildings owned by it or ordered by the board of councilmen, at the rate of one and $\frac{20}{100}$ dollars per one thousand cubic feet; that said board of councilmen should determine what sized burners should be used, so that they should not burn less than four feet to the hour for each, the lighting of same to be regulated in such manner as might from time to time be directed by said board of councilmen; that the amount of gas consumed by said street lamps and public buildings owned by def't should be ascertained by the customary meter measurement; that gas should be furnished to the citizens of def't city for their private consumption at the rates as follows, to wit, at $1.90 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five
40 years from June 11th, 1887; at $1.75 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of fifteen years from June 11th, 1892; that all public street

lamps, lamp posts, and other requisite fixtures appertaining thereto should be furnished by and at the expense of pl't'ff and erected at such times, points, and in such numbers where the main pipes were laid as the def'd't might direct; that the same should be lighted upon their erection and continued in use thereafter as in said contract provided; that when def'd't should determine that a gas post should be removed from one point to another or be discontinued the pl't'ff should remove same at def't's expense for such removal, and, if discontinued, the same, including requisite fixtures for the lamp post, should be purchased by def'd't at their original cost; that public street lamps should be cleaned, lighted, and kept in repair at def't's expense, and if def'd't should at any time desire to have public street lamps erected at any of the public buildings or to light any street, lane, alley, etc., and pl't'ff should refuse to extend the pipes to such points in def'd't city, then the latter should have the privilege of extending said pipes at its own cost and to order the erection of such number of public street lamps for the purpose aforesaid as it might deem proper, the same to be erected upon the same conditions and furnished with gas upon the same terms as the other public street lamps of the city, the main gas pipes so laid down not to be used, directly or indirectly, for furnishing gas except for public street uses, nor other pipes to be laid down along any part of the streets so occupied by gas pipes laid down at the def'd't's expense until
41 the whole amount so expended by def'd't in laying down said pipes be refunded to def'd't by pl'ff and its successors, when the said pipes should become the property of pl't'ff, provided that pl't'ff, if required or ordered so to do by def't's said board of councilmen, should lay down on such street or streets as said board might designate not less than one thousand feet of main gas pipe annually; that inasmuch as the then existing contract between the def'd't and the Covington Gas Light Company would expire on the 11th day of June, 1882, and that by the terms of same the city council of def'd't or those with whom they might contract to light def'd't city thereafter might purchase the pipes, lamp posts, fixtures, etc., of said Covington Gas Light Company in def'd't city in accordance with a valuation thereof to be determined as provided in a certain ordinance bearing date the 11th day of June, 1857, entitled An ordinance providing for the lighting of the city of Newport, Kentucky, with gas, and therefore, in consideration of the undertakings of pl't'ff in said contract of June 3rd, 1880, the said right of purchase, with all privileges incident or relating thereto, were by def'd't in its said contract assigned, transferred, and vested in pl't'ff in as full a manner as they belonged to def'd't, the latter therein guaranteeing to pl't'ff the accomplishment of said purchase and transfer, and the pl't'ff, in consideration thereof, therein binding itself to make said purchase, as aforesaid, and to light the def'd't city thereafter according to the stipulations and provisions of said contract, that pl't'ff and its successors reserved and should have the right, upon the expiration of said contract, to remove any or
42 all its pipes, lamp posts, fixtures, etc., unless said contract

should be renewed, or def'd't might purchase said pipes, lamp posts, fixtures, etc., the value thereof to be ascertained by five desinterested persons, residents of Kentucky, two of whom should be chosen by def'd't, two by pl't'ff, and the fifth by the four so chosen; that for the gas consumed by it in the public lamps, public buildings, and elsewhere, as the quantity might be ascertained from the meters each month, the def'd't should pay cash to the pl't'ff, and, finally, that pl't'ff should, within fourteen days from the date aforesaid, to wit, June 3rd, 1880, signify in writing its acceptance of said contract; whereupon the same should "become a binding contract" between pl't'ff and def'd't, it being further provided that within twenty days from said date pl't'ff should execute bond, with good and approved security, to def'd't for the faithful performance of all its duties, as in said contract enjoined and stipulated, and for a strict compliance by pl't'ff with all the terms, conditions, and requirements of same.

And pl't'ff says that said contract, according to the tenor and effect aforesaid, was embodied and embraced in an ordinance duly and regularly passed by the mayor and board of councilmen of def'd't on the date aforesaid, which by its terms took effect from its passage. A true copy of said ordinance, entitled "An ordinance further providing for the lighting of the city of Newport, Ky.," is herewith filed and made a part hereof, marked Exhibit "A."

Pl't'ff says that within fourteen days from and after the
43 passage thereof, as aforesaid, it signified, in writing, its acceptance of said contract, as provided therein, and that within twenty days from and after said date it executed and delivered to def'd't its bond, with good and approved security, for the faithful performance of all and singular its duties under said contract, as therein enjoined, and for a strict compliance with all the terms, conditions, and requirements thereof; which bond was duly accepted by def'd't. And pl'ff says that thereafter, to wit, upon the — day of ——, 188–, it entered in good faith and with all proper diligence upon the performance of all and singular its duties under said contract, according to the terms and conditions thereof; that in so doing it has necessarily made great and burdensome outlays and expenditures in money and material, amounting in the aggregate to more than one hundred thousand dollars; that it has likewise and of necessity expended great labor and been put to much trouble and pains in the due and proper performance of its several covenants aforesaid; that, relying thereupon, it has, in the utmost good faith and in the determination to fully perform its said undertakings, purchased from said Covington Gas Light Company, as provided in said contract, its pipes, lamp posts, fixtures, etc., at great expense, to wit, nearly sixty thousand dollars; that its additions thereto under said contract have been made at a cost of more than forty thousand dollars; that these large sums have been necessarily expended under said contract and in reliance thereupon by pl't'ff, as def'd't well knew at the time thereof and with its approval; that it has ever since duly and regularly proceeded,
44 with def'd't's knowledge and consent, in the execution of

said contract, and has at all times furnished def'd't with gas, as therein provided; that it is still ready, willing, and able to furnish same to def'd't in such quantities as it may require and in all respects to further perform and execute said contract in all its requirements; of all which def'd't has full knowledge. But pl't'ff says that the def'd't, wholly ignoring and disregarding the provisions of its said contract and for the purpose of annoying and harrassing pl't'ff, has recently been and still is making attempts to enter into a similar contract with other persons and companies, against the protest of this pl't'ff; that, to this end, on or about the — day of January, 1885, pursuant to a resolution of its board of councilmen, it advertised for proposals for the lighting of its public highways, &c., for the term of — years from the 8th February, 1885, "*was* soon thereafter as the same can be done." A copy of said resolution is herewith filed as a part hereof, marked Exhibit "B."

Pl't'ff says that on the 6th day of February, 1885, pursuant to a resolution passed by the city council of def'd't on the preceding day, it was notified by def't's committee on gas and its official attorney that its contract with def'd't was at an end on the 8th day of February, 1885. Said resolution and notice are herewith filed, marked Exhibit "C." And pl't'ff says that on the 10th day of February, 1885, pursuant to a resolution passed by the board of councilmen of def'd't on the preceding day, it was notified by def'd't that, among other things, there was, in the judgment of said board, no existing contract between pl't'ff and def'd't for the furnishing of gas for lighting the streets, lanes, alleys, or public places of def'd't city; that the def'd't had not directed or required the furnishing the supply of gas for that purpose, and "does not now do so with any reference to any pre-existing contract, and that for any gas which may hereafter be furnished it may be done without reference to any former contract, and which either party is at liberty to discontinue at their option without notice."

Said resolution and notice are herewith filed, marked Exhibit "D."

And pl'ff says that thereupon it notified def'd't that it relied upon its contract aforesaid and would continue to furnish gas, etc., as it was then doing under and pursuant to said contract and not otherwise; that the def'd't, nevertheless, still disregarding its said contract and determined with purpose as aforesaid and in bad faith to violate same, has continued and is still continuing its efforts to make a contract with other persons for the lighting of its streets, alleys, lanes, and public places, and is threatening to do so at the next meeting of its board of councilmen; that to that end its arrangements are either perfected or are being perfected for the final consummation thereof at its next meeting, as aforesaid, and that unless restrained and inhibited from so doing the def'd't will speedily, in bad faith and in violation of the terms and meaning of said contract, make a new contract with some other person, company, or corporation for the lighting of its streets, etc., as aforesaid; that it is likewise def'd't's purpose to discontinue the taking of gas

from pl't'ff and to take same from other parties, as well as to
46 grant to the latter the privilege of furnishing same to private consumers; that by reason thereof pl't'ff will be made to suffer great and irremediable loss and injury.

Wherefore pl't'ff prays that an order of injunction issue director to the def'd't, its officers and agents, and to said board of councilmen, strictly enjoining and restraining them and each of them from making any contract with any persons, company, partnership, or corporation for the lighting of def'd't's streets, lanes, alleys, or public buildings or places, and from discontinuing the taking of gas from pl't'ff for the lighting of said places in such quantities as it may require, and for all such further relief as pl't'ff may in equity be entitled to.

NELSON & WASHINGTON,
Att'ys for Pl't'ff.

John A. Williamson says that he is the president of The Newport Light Company, pl't'ff in the foregoing petition; that the statements therein contained are true, as he believes; that the injunction therein prayed for has not been refused by the court or by any circuit judge, and that irreparable injury will result to said pl't'ff company if said injunction be not immediately granted.

JOHN WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson, president of the Newport Light Company, this 19th day of February, 1885.

JOHN C. SCHROLL, *Cl'k.*

47 STATE OF KENTUCKY, } *set:*
Campbell County, }

To the city of Newport, its officers, agents, &c.:

You are hereby enjoined and restrained from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the city of Newport with gas or otherwise and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places in such quantities as may be required for that purpose until the further orders of this court.

Given under my hand this 19th day of February, 1885.

JOHN C. SCHROLL,
Clerk Campbell Chancery Court.

And on the 13th day of July, 1885, Judge Simrall filed his opinion in court herein; which is in words and figures as follows, to wit:

Opinion by Judge Simrall.

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT, Defendant.

and

DUEBER LIGHT CO., Plaintiff,
vs.
NEWPORT LIGHT CO., Defendant.

These actions were transferred to this court from the Campbell chancery court. They involve substantially the same ques-
48 tions and were heard together. On the 17 Feb'y, 1874, the legislature of Kentucky passed "an act to revise and amend the charter of the city of Newport."

By the 6th sec. of said act the city of Newport was given power "to construct, maintain, and operate gas and water works and to pass all ordinances necessary to regulate the same, provided that no existing contract shall be affected thereby." See Acts 1873–'4, p. 333.

In 1879–'80 the Newport Light Company was incorporated by act of the legislature and was empowered to "furnish any city, town, district, corporation, or locality or any public institution, manufacturing establishment, or private premises with gas or other light for such time and on such terms as may be agreed upon by the parties."

In pursuance thereof the Newport Light Company entered into a contract (by ordinance) with the city of Newport in 1880, by which, amongst other things, it was stipulated that the Newport Light Company should have the exclusive privilege of using any and all streets, lanes, commons, and alleys and public places of said city for the purpose of laying pipes to convey and supply gas to it and others, said privilege to be so enjoyed and used for the term of twenty-five years and until the city should give said company twelve months' notice to terminate the same; that said company should furnish the city of Newport upon its several streets, alleys, and public places in which pipes were so laid a continuous supply
of gas equal in quality to Cincinnati gas, in such quantities
49 as the city might require and direct for the use of the public street lamps and public buildings owned by it or ordered by the board of councilmen at the rate of one and $\frac{20}{100}$ dollars per thousand cubic feet.

There are many details to said contract, which further provides for furnishing gas also to the citizens on terms named, and also for the purchase by said Newport Light Co. of the pipes, lamp posts, fixtures, &c., of the Covington Gas Light Company and then for the purchase of said property by the city of Newport from the Newport

Light Company in certain contingencies upon the terms and conditions in said contract specified.

Accordingly the Newport Light Co. entered upon the execution of said contract and expended in so doing over one hundred thousand dollars in the purchase of property, making extensions, laying pipe, &c.

In February, 1885, "the Dueber Light Company" was incorporated by recording articles in the county clerk's office of Campbell county under the general laws of the State of Kentucky, with "power to contract with and supply to the citizens and inhabitants of the city of Newport gas for illuminating and other purposes and to have, own, hold, and maintain all pipes, property, and fixtures necessary for said purposes."

Some time thereafter the Dueber Light Co. applied to the mayor and common council of Newport for permission to lay pipes in the streets of the city for the purpose of supplying gas to its citizens in manner aforesaid, which license was granted, and it is claimed that the city of Newport was proceeding to make a contract with the Dueber Light Co. to furnish gas to the city in disregard of its
50 prior contract with the Newport Light Co. for the same purpose. There was an abortive effort to make a new contract with the Newport Light Co. Thereupon this litigation ensued. The Newport Light Co. in the action against the city of Newport seeks to enjoin the city from making or executing such new contract. The Dueber Light Co. in the action against the Newport Light Company seeks to enjoin the latter from claiming or asserting any exclusive right or privilege to the use of the streets, alleys, or public places of the city of Newport for the purpose of laying down or maintaining pipes and other fixtures to supply gas to the citizens and inhabitants of said city for twenty-five years or any other time.

In this action the Newport Light Co. makes its answer a counterclaim against the plaintiff, Dueber Light Co., and a cross-petition against its codefendant, The City of Newport, and prays that the Dueber Light Co. be enjoined from laying any gas pipes, &c., in the streets, &c., of Newport, and that the city of Newport be enjoined from taking any steps towards conferring such power upon said company, and that the city be further enjoined from making any contract with said company looking to that end or in violation of the rights of the Newport Light Company.

It will thus be seen that the foundation of this controversy is the right to lay gas pipes in the streets and other public places of the city of Newport

We will consider the legal right of the parties separately, and when they are ascertained it will not be difficult to apply the remedy:

51 I.

What right has the Dueber Light Company to lay gas pipes in the streets of Newport? None whatever in the opinion of the court. It is a corporation, as exhibited on the face of its pleading, created

not by act of the legislature, but under the general incorporation laws of the State.

The general statutes, chap. 56, under which this corporation was organized, expressly provides that "such incorporation shall confer no powers or privileges not possessed by natural persons except as therein provided."

Nothing is thereinafter provided which takes such a corporation as the Dueber Light Co. from under the operation of that statutory requirement.

It is certain, then, that the act of incorporation did not and could not confer upon that company the right to lay gas pipe in the streets of Newport, for that is a right not possessed by any natural person.

The right to lay gas pipe in the streets of a city is a franchise which can only be conferred through the sovereign power of the State. The doctrine is thus stated by Dillon in his work on Municipal Corporations, 3rd ed., sec. 691:

"In Great Britain express legislation is necessary to warrant the laying down of gas pipes in the public highways, and so in this country it is also considered that the right to the use of the public streets of a city by a gas company for the purposes of laying down its pipes is a franchise which can be granted only by the legislature or some local or municipal authority empowered to confer it." See also 180 St. Rep., 292.

52 It only remains to inquire whether the grant of the right to the Dueber Light Co. by the city of Newport, through its mayor and council, conferred any authority or had any efficacy. We think not. The act was void because the city of Newport had no power to make such grant, and, as we have just seen from Dillon, "no local or municipal authority" can create such a franchise until it has itself first been "empowered to confer it."

This brings us to consider the rights of the Newport Light Co.:

II.

The only express power conferred upon the city of Newport by the legislature of Kentucky touching the matters in litigation was to construct, maintain, and operate gas works and to pass all ordinances necessary to regulate the same, which, of course, carried with it, under the well-known doctrine of reasonable implication, the implied authority to use the streets in laying pipe for that purpose.

It seems to be conceded that the city of Newport, having this power to construct and operate gas works and lay pipes for that purpose, could, by proper contract, employ some other person or corporation to do precisely the same thing with the same powers.

This was done with the Newport Light Co., and when it was done the power of the city of Newport over the entire subject was exhausted.

It must be borne in mind that there was no "legislative discretion" given to the city of Newport to grant the franchise

53 of the right to lay gas pipes in the streets to persons and corporations indiscriminately or generally.

The franchise was granted to the city of Newport to be exercised by the city and that by implication, and the only right which the city of Newport had it transferred by contract to the Newport Light Co.

We believe the rule is universal that the municipal authorities of a city cannot grant a franchise in the use of its streets for the purpose of laying or operating a street railway on the surface of the street without first having received express authority so to do from the State legislature. The tearing up of a street and laying gas pipe therein is much more inconsistent with the use to which the street was originally dedicated. In Penn. R. R. Co. *vs.* Nat. R. R. Co., 8 C. E. Gr., 441, the New Jersey court of appeals says, "Whether franchise- are delegated by special charters or under general laws, they are emanations from the people in their sovereign capacity. What is not conferred is withheld and remains in the original source. The attempt to exercise them by individuals or companies until so conferred can be nothing but an unwarranted usurpation of power. This doctrine is rooted and grounded in the common law we inherit and equally so in public policy and public expediency."

In the celebrated and leading case of Bank of Augusta *vs.* Earle, 13 Peters, 519, the Supreme Court of the United States announce this rule in its broadest terms as applicable to every franchise. The court says: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in
54 this country no franchise can be held which is not derived from a law of the State."

Assuming this to be the law, there are still two objections urged to the validity of the contract between the city of Newport and the Newport Light Co.:

First. That it creates a monopoly, and for that reason is against public policy and void.

Second. That it gives exclusive public privileges which are not in consideration of any public service, and is therefore interdicted by the 1st sec. of our "Bill of rights," which provides that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services."

(1.) As to the first objection, we do not think it can be raised in these actions, because there is no application to restrain the Dueber Light Co. from manufacturing or selling gas, but only to restrain it from laying pipes in the streets and from exercising a franchise which it does not possess.

The definition of a monopoly given by Mr. Justice Field in the "Slaughter-house cases" has become standard in this country.

He defines it "to be an institution or allowance from the sovereign power of the state, by grant, commission, or otherwise, to any person or corporation for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic

or corporate, are sought to be restrained of any freedom or liberty they had before or hindered in their lawful trade."

55 It relates to the deprivation of right common to all men before the legislative grant.

It is obvious that this cannot apply to a franchise; for, as we have seen, this is not a natural right; it is a right which no person or corporation has or can exercise except as the power may be given through the General Assembly of the Commonwealth.

(2.) As to whether the Newport Light Company has an exclusive public privilege, and whether such privilege was granted in consideration of public service to be rendered the city of Newport, consistently with the Constitution, so as to make it unlawful for the State legislature hereafter to grant a similar right to any other person or corporation, it seems unnecessary now to decide.

In the view taken of the law by this court that contract is valid and exclusive, so far as the city of Newport is concerned, because it has exhausted its power over the subject, and it is also exclusive as to the Dueber Light Co. because it has no rights in the premises. In fact it is exclusive as to all the world until the legislature in its sovereign power may see fit to grant the same right to somebody else, if its power also has not been exhausted.

1. This exclusiveness grows out of the very nature of a franchise, being a right not pre-existent, but created and exercised only in pursuance of special legislative authority in each particular case.

As said by the learned vice-chancellor in the case of Jersey City Gas Co. *vs.* Dwight, 29 New Jersey Equity Reports, 249—

56 "It must also be declared as the established law of this State that the grant of a franchise by the State is by its own intrinsic force and without express words exclusive against all persons but the State, and that any attempt to exercise like rights and privileges without legislative authority is a fraud and an unwarrantable usurpation of power."

In the same opinion the court says, "The complainants have a right to use the public highways of Jersey City for the purpose of carrying their gas by pipes to all who want it. The defendants have no such right, but threaten to exercise it by usurpation, and thus acquire part of the complainants' business.

In this condition of affairs I do not think there can be the slightest doubt as to the duty of the court. The right of a corporation to seek the protection of a court of equity against an infringement or usurpation of its franchise is a familiar rule of equity well established.

And it is equally well established that a franchise is property, which, like every other thing susceptible of private ownership, is under the protection of the law.

It might be *obiter dictum* for this court now to determine whether the right of the Newport Light Co. is exclusive against the State. At any rate, it is not considered necessary, and the court will not follow the learned counsel on both sides in their very able investigation of the conflicting authorities upon this subject. It will be time enough to determine that question when some corporation or

person authorized by the State according to the forms of law comes property before the court to raise it.

57 As the court is now advised, the Dueber Light Co. has no rights in the premises, and has, therefore, no standing in court and is entitled to no relief.

The Newport Light Co. is entitled to an injunction, as prayed, both against the Dueber Light Co. and the city of Newport.

The demurrer of the Dueber Light Co. to the answer, counter-claim, and cross-petition of the Newport Light Co. is overruled. The demurrer of the Newport Light Co. to the petition of the Dueber Light Co. is sustained. Let exceptions be entered for both parties.

The injunction against the city of Newport is made perpetual in the suit of the Newport Light Co. against the City of Newport.

The other action was only submitted on the demurrers.

Mess. Carlisle & Carlisle & Nelson & Washington, attorneys for Newport Light Co.; Mess. Wm. Lindsay, T. F. Hallam, Jos. C. Wright, attorneys for Dueber Light Co.; E. W. Hawkins, attorney for the city of Newport.

Chapter 653 of Acts 1889 and '90 is in the words and figures as follows, to wit:

58 CHAPTER 653.

An act to incorporate the Edison Electric Illuminating, Heating and Power Company of Newport, Kentucky.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That T. P. Carothers, J. J. Hetsch, P. P. Eyer, H. M. Healy, John Halloran, F. R. Draddy and William Gildehaus, their associates, successors and assigns, be, and they are hereby, incorporated and created a body politic, by the name of the "Edison Electric Illuminating, Heat and Power Company of Newport, Kentucky;" and shall by such name have perpetual succession, with power to sue and be sued, contract and be contracted with, including the right to purchase, hold and convey real estate; to have and use a common seal, and change and alter the same at pleasure; and generally do and perform all things necessary to be done and performed in the conduct of its business hereinafter set forth; to ordain and put in execution such by-laws, rules and regulations, for the government of its affairs, as may be deemed expedient and proper; and the same may be altered or amended at any regular or called meeting by a majority of the stock, after a motion to that end shall have been entered at any regular or called meeting, held not less than thirty days previous; provided, such by-laws, rules and regulations, shall not be inconsistent with the Constitution and laws of this State or of the United States.

§ 2. The capital stock of the corporation shall be fixed by the company, but shall not exceed two hundred thousand dollars,

59 and shall be divided into shares of not more than one hundred dollars each.

The stock shall be transferable on the books of the company according to the by-laws; but the company shall hold a lien upon the shares of any stockholder who may be indebted to it, and such shares shall not be transferable without the consent of the president and directors first had, or until said debt shall have been paid and discharged.

§ 3. The corporation shall be governed by a board of seven directors, which number may be increased to nine. The directors shall be elected annually by the stockholders from their number, on the first Monday in January of each year, and shall hold their office until their successors are duly elected and qualified.

The directors shall elect from their number a president and vice-president, and may elect a secretary and treasurer, who shall be stockholders in said company, and may appoint such other officers and agents as may be necessary for the proper conduct of the business and affairs of the company, and may fix their compensation, and may receive bond from any or all of them for the faithful performance of their respective duties. The incorporators above named shall act as directors until a board shall be regularly elected and qualified.

§ 4. Each one hundred dollars of stock in said company, whether in one or more shares, shall entitle the holder or holders thereof to one vote, in person or by written proxy, in all elections for officers and all meetings of said company for any purpose.

§ 5. Said corporation is hereby authorized to create an in-
60 debtedness, in such amount as the stockholders may order, and may issue its bonds therefor, secured by lien or mortgage upon its property rights or upon all thereof.

§ 6. The private property of the members, stockholders or incorporators of the corporation, shall not be liable for corporate debts or liabilities.

§ 7. The general nature of the business of the corporation shall be the erecting, operating and maintaining a general system of electrical dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat and power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants, and other persons and corporations, and municipal corporations, located in or near said city, with light, heat and power by the electric current.

§ 8. Said corporation is authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, lighting and heating, in, under, on and over the streets, alleys and by-ways of said city and adjacent thereto: provided it shall in no way permanently obstruct the use of the same to the public or any individual; and it is hereby required to place in repair any street or highway under which it may lay its conduits, or in which it may erect its poles, or do such other work consistent with the general nature of the business of the corporation; but it may temporarily obstruct same.

§ 9. Work under this act shall be commenced in two years,
61 and the work put in operation within five years from the passage of this act.

§ 10. This act shall take effect and be in force from and after its passage.

Approved April 9, 1890.

Section 6, chapter 847, of Acts 1889, and '90, entitled An act to amend the charter of the city of Newport, is in the words and figures as follows, to wit:

The board of councilmen are hereby authorized to contract for lighting the city of Newport and its inhabitants in any mode now known or which may hereafter be discovered, and in so doing grant the use of the public places and of the streets of the city for such purposes: Provided, that said contract shall not interfere with any existing right or contract.

§ 7. All acts in conflict with this act are hereby repealed.

§ 8. This act shall take effect from and after its passage.

Approved April 17, 1890.

Said demurrer to response filed in the foregoing order is in the words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs.
CITY OF NEWPORT

62 and

DUEBER LIGHT CO.
vs.
NEWPORT LIGHT CO.

Demurrer to Response to Rule.

Now comes the Newport Light Co. and demurs to each and every paragraph of the response filed by the defendant Albert S. Berry and others, for the same presents no defense to the rule against them.

J. G. CARLISLE AND
NELSON & DESHA,
Att'ys for Newport Light Co.

At a court held for the court aforesaid on the 13th day of July, 1891—

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY, Plaintiff,
vs.
CITY OF NEWPORT, Defendant, } In Equity.

and

DUEBER LIGHT COMPANY, Plaintiff,
vs.
NEWPORT LIGHT COMPANY, Defendant. } In Equity.

The court being sufficiently advised, it is now ordered and adjudged that the demurrer and exceptions of the respondents to the rule and affidavit herein are overruled, to which said respondents except, and the demurrer of the Newport Light Company to
63 the response filed herein is sustained, and the said response is adjudged insufficient, to which said respondents except, and, the respondents to the rule failing to make further response, it is adjudged that the acts set forth in the affidavit herein constitute a violation of the injunction heretofore granted in these causes, to which said respondents except; and the said respondents are allowed until the twenty-fourth day of July, eighteen hundred and ninety-one, to purge themselves of their contempt herein by setting aside and annulling the contract with the Suburban Electric Illuminating, Heating and Power Company, dated April 23rd, 1891, and ceasing to light or to have lighted the streets, lanes, alleys, public buildings or places of the city of Newport under said contract; and the said respondents are hereby ordered to rescind and set aside, before the said twenty-fourth day of July, eighteen and ninety-one, the resolution passed on the twenty-third day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company, to which said respondents except; and the city of Newport is ordered to continue to take gas from the said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between the said city or Newport and the said company, dated June third, 1880, to which said respondents except.

And this proceeding is continued to the twenty-fourth day of July, 1891.

64 COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex-officio* clerk of the Louisville law and equity court, do hereby certify that the foregoing 60 pages contain a full, true, and complete transcript of all the proceedings had in the actions of The Newport Light

Co. *vs.* City of Newport, # 1607, and The Dueber Light Co. *vs.* Newport Light Co., # 1606, on the motion for contempt of court.

Witness my hand this 16th day of July, 1891.

JOHN H. WELLER,
Cl'k Lou. Ch'y C't & ex Officio Cl'k Lou. Law & Equity C't.
By J. G. WALKER, *D. C.*

On which transcript was endorsed the following statement:

Kentucky Court of Appeals.

CITY OF NEWPORT, A. S. BERRY, Mayor; P. J. RYAN, JOHN HALLORAN, M. Donelan, James Knoblaugh, John Wall, Wm. Cassidy, Jacob Smith, Geo. Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, Jas. E. McCracken, John Schnorr, and Benj. Kein, Members of the Board of Councilmen of the City of Newport, Appellants,

vs.

NEWPORT LIGHT CO., Appellee.

65 The judgment appealed from was rendered by the Louisville law and equity court on July 13, 1891, and will be found on page 59 of this record. Appeal asked to be granted by the clerk of this court with summons to Campbell Co.

JOHN P. NEWMAN, *Att'y.*

Upon the filing of which the clerk of said court of appeals granted an appeal to said appellants.

At the same time, September 18, 1891, the appellants executed a supersedeas bond before the clerk of said court of appeals, which is in words and figures following, to wit:

Court of Appeals of Kentucky.

CITY OF NEWPORT and A. S. BERRY and P. J. Bryan and Others, Members of the Board of Councilmen of City of Newport, Appellants,

against

NEWPORT LIGHT CO., Appellee.

Supersedeas Bond.

Whereas said appellant- have taken an appeal from a judgment of the Louisville law and equity court rendered on July 13th, 1891, against them in favor of the appellee, overruling the demurrer and exceptions of respondents to rule and affidavit, and sustaining the demurrer to the response, and adjudging said response insufficient, and adjudging "that the acts set forth in the affidavit herein constitute a violation of the injunction hereinbefore granted in these causes," &c., and ordering said respondents "to rescind and
66 set aside before the said 24th day of July, 1891, the resolution passed on the 23rd day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company," &c., and ordering "the city of Newport" to con-

tinue to take gas from said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between the said city of Newport and the said Co., dated June 3, 1880, and the appellant- desire to supersede said judgment:

Now we, City of Newport, A. S. Berry and P. J. Ryan and others, members of the board of councilmen of the city of Newport, principal-, and H. Worthington, securit*ies*, covenant to and agree with the appellee, Newport Light Company, that the appellant- will pay to the appellee all costs and damages that may be adjudged against the appellant- on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed or any judgment or order which the court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 18th day of September, 1891.

HENRY WORTHINGTON,
By his attorney-in-fact, JOHN P. NEWMAN.

Attest: A. ADDAMS, *C. C. A.*

Whereas an appeal from the judgment of July 13th, 1891, in the cases of The Newport Light Co. *vs.* The City of Newport and
67 others, and The Dueber Light Co. *vs.* The Newport Light Co. and others, in the Louisville law and equity court, is about to be prayed of the clerk of the court of appeals of Kentucky to that court by A. S. Berry and the other defendants found by said judgment to be in contempt: and whereas said defendant- desire to super*sead* said judgment: Now, therefore, I hereby authorize John P. Newman, Esq., to sign my name to a supersedeas bond therein as surety for said defendants.

Witness my hand this 16th day of September, 1891.

H. WORTHINGTON.

Upon the execution of said bond the following supersedeas was issued, together with summons:

STATE OF KENTUCKY,
CLERK'S OFFICE OF THE COURT OF APPEALS.

As clerk of the court of appeals of the State aforesaid I certify that an appeal has been granted according to law from a judgment obtained by Newport Light Company against City of Newport, &c., sustaining demurrer to response and adjudging response insufficient, and that the acts of appellants were a violation of the injunction and ordering a re-cis-ion of the contract and ordering the city council to set aside resolution passed on April 23, 1891, and to continue to take gas from the appellee, &c., in the Louisville law and equity court on July 13, 1891, in a certain petition, and that a supersedeas bond has been executed. Wherefore the appellee and all

others are hereby commanded to stay proceedings on said judgment.

Witness A. Addams, clerk of the court of appeals, this
68 18th day of September, 1891.

A. ADDAMS, *C. C. A.*

Executed the within supersedeas this 19th day of September, 1891, on the Newport Light Company by delivering a true copy thereof to John A. Williamson, he being at the time the president and chief officer in my county of said Newport Light Company.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

Summons on Appeal.

The Commonwealth of Kentucky to the sheriff of Campbell county, Greeting:

We command you to summon Newport Light Company to appear before the judges of the court of appeals of Kentucky, at the capitol, in Frankfort, on the first day of their next January term, to show cause, if any it can, why a judgment obtained by it in the Louisville law and equity court against City of Newport, A. S. Berry, mayor, and P. J. Ryan and others, members of the board of councilmen of the city of Newport, on July 13, 1891, should not be reversed for the errors therein contained, as we from their complaint are informed, and have then there this writ.

Witness A. Addams, clerk of our said court, at the capitol aforesaid, this 18th day of September, 1891.

A. ADDAMS, *C. C. A.*

Executed the within summons this 19th day of September, 1891,
on the Newport Light Company by delivering a true copy
69 thereof to Jno. A. Williamson, he being at the time the president and chief officer in my county of said Newport Light Company.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

Afterwards, on the 29th of September, 1891, the appellant filed an additional record in the office of said clerk of the court of appeals in words and figures following:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs. } # 1607.
CITY OF NEWPORT.

DUEBER LIGHT COMPANY
vs. } # 1606.
NEWPORT LIGHT CO.

Pleas before the honorable judge of the Louisville law and equity court, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

NEWPORT LIGHT COMPANY
vs.
CITY OF NEWPORT, A. S. BERRY, Mayor of City of Newport; P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, Wm. Cassidy, Jacob Smith, Geo. Tippenhauer,
70 Ed. Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, & Benj. Keim, Members of the Board of Councilmen of the City of Newport.

Be it known that heretofore, to wit, at a court held for the court aforesaid on the 7th day of July, 1891—

NEWPORT LIGHT CO.
vs. } # 1607.
CITY OF NEWPORT.

DUEBER LIGHT CO.
vs. } # 1606.
NEWPORT LIGHT CO.

Came Newport Light Co., by Carlisle, counsel, and filed in court the affidavit of John A. Williamson and three exhibits.

And, on its motion by said counsel, a rule is awarded it against City of Newport, A. S. Berry, William Cassidy, James E. McCracken, John Halloran, Michael Donelan, Edward Enneking, George Tippenhauer, John Schnorr, James Knoblock, B. W. Keim, Phillip J. Ryan, James Smith, James Dunnigan, John C. Wall, and J. H. Egelston, returnable 13th inst., to show cause, if any they have or can, why they shall not be punished for contempt of court.

(The affidavits and exhibits referred to in this order are copied into this transcript on pages 3 to 15, inclusive.)

And thereupon the clerk issued rule and copy, directed to the sheriff of Campbell county, which is in the words and figures as follows, to wit:

(The rule referred to above is copied into this transcript on pages 20, 21, and 22.)

71 At a court held for the court aforesaid on the 8th day of July, 1891—

NEWPORT LIGHT CO. vs. CITY OF NEWPORT. } #1606.

DUEBER LIGHT CO. vs. NEWPORT LIGHT CO. } #1607.

Came Newport Light Company, by Carlisle, counsel, and filed the affidavit of J. A. Williamson herein.

And on its motion a rule is awarded it against Jacob Smith, returnable 13th July, 1891, to show cause, if any he has or can, why he shall not be punished for contempt of this court.

(The affidavit and rule referred to in this order are copied into this transcript on pages 22 to 24.)

At a court held for the court aforesaid on the 13th day of July, 1891—

NEWPORT LIGHT CO. vs. CITY OF NEWPORT. } #1606.

DUEBER LIGHT CO. vs. NEWPORT LIGHT CO. } #1607.

Came the respondents, The City of Newport and The Mayor and Board of Councilmen of the City of Newport, and by counsel file exceptions and a demurrer to the affidavit of John A. Williamson herein upon which the rules herein were issued.

Came George Tippenhauer, John Schnoor, and Michael Donelan, by counsel, and filed a response to the rule against them, and said response was adjudged sufficient, and the rule against them was discharged.

Came the City of Newport and the Mayor and Members of the Board of Councilmen thereof, and, without waiving their exceptions and demurrer this day filed, filed a response to the rule issued against them herein.

72 And came the Newport Light Company, by counsel, and filed a demurrer to each and every paragraph of said response.

And this action was heard and submitted on all exceptions and demurrers and on the whole case.

(The exceptions referred to in this order are copied into this transcript on pages 25 to 37, inclusive. The demurrer is copied on page 62.)

At a court held for the court aforesaid on the 13th day of July, 1891—

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY, Plaintiff,
vs.
CITY OF NEWPORT, Defendant, } In Equity.

and

DUEBER LIGHT COMPANY, Plaintiff,
vs.
NEWPORT LIGHT COMPANY, Defendant. } In Equity.

(Here follows the judgment of the court, which is copied into this transcript on page 62.)

At a court held for the court aforesaid on the 3rd day of August, 1891—

NEWPORT LIGHT COMPANY
vs.
CITY OF NEWPORT. } # 1606.

CITY OF NEWPORT
vs.
DUEBER LIGHT CO. } # 1607.

Came City of Newport and filed its answer to the rule
73 herein.

Said answer of City of Newport is in the words and figures as follows, to wit:

CITY CLERK'S OFFICE,
NEWPORT, KY., *July* 19, 1891.

At a meeting of the board of councilmen held on the above date the following message was presented and read, to wit:

To the board of councilmen of the city of Newport, Ky.:

The controversy concerning the lighting of the city with electricity has assumed a shape not anticipated by me when the contract was entered into on April 23, '91, and the order made to discontinue the lamp posts. My understanding was that a reasonable construction of the argument was that the city might discontinue any number of the gas posts at her pleasure by paying the original cost of same and the attorneys of the electric light Co. so interpreted the paper upon whose judgment we relied.

To my surprise, Senator Carlisle, the astute attorney for the gas company, chose to proceed upon an injunction granted years ago by the Louisville chancery court, and the presiding judge of that court issued a rule against the mayor and board of councilmen to show cause why they were violating the said injunction. That injunc. prohibited the city of Newport from contracting for any

other light than the miserable and unsatisfactory light furnished by the Newport Light Co.

74 Judge Toney, after hearing a full discussion of the questions involved, held that the injunction was still in full force and gave the officials ten days in which to comply with his order which was to annul the contract made on April 23, '91.

I do not propose to disregard the order of the court as an official of the city, as I would not were it an individual matter.

I therefore advise the council — rescind the contract made with the said Suburban Electric Light Company and revoke the order discontinuing the lamp posts in obedience to the order of said Louisville chancery court and the electric light Co. can proceed to determine her rights in such tribunals as she may select.

I am well aware of the methods by which the contract with the city for lighting it with gas was consum-ated, conceived in fraud, and brought forth — iniquity. It was only made possible by the connivance of certain city officials who should have been the guardians of the corporation.

I am convinced that the people of Newport would much prefer the brilliant electricity to the yellow inferior gas but one remove from the tallow dip.

If any culpability is to be attached to any one let it fall upon those who in 1880 sold us out to the gas company. I shall obey the order of court.

A. S. BERRY, *Mayor.*

A copy.
Attest:
[SEAL.] M. J. COSTIGAN, *City Clerk.*

75 Judge Toney:

I enclose the foregoing message to the Newport council as my answer to the rule from your court ag'st the city of Newport.
July 28th, '91.

A. S. BERRY,
Mayor of Newport.

At a court held for the court aforesaid on the 4th day of August, 1891—

NEWPORT LIGHT CO. *vs.* CITY OF NEWPORT. } # 1607.

DUEBER LIGHT CO. *vs.* NEWPORT LIGHT CO. } # 1606.

Came the City of Newport and A. S. Berry, the mayor, and the members of the board of councilmen of said city of Newport and prayed the court to grant an appeal from the judgment of this court of July 13th, 1891, adjudging said city, mayor, and board of councilmen guilty of contempt of this court, and the court refuses

to grant the appeal, and the said city, mayor, and members of the board of councilmen except.

Came the City of Newport and the mayor and members of the board of councilmen of said city of Newport and filed a supplemental response herein, which is adjudged to be sufficient, to which said City of Newport, the mayor, and members of the board of councilmen except, and time until the 25th of September, 1891, is given them to obey the order of July 13, 1891, herein.

Came Newport Light Company, by council, and filed herein the affidavit of John A. Williamson and Exhibits A, B, and C herein.

And a rule is awarded it against Frank A. Kelly, returnable September 25th, 1891, to show cause why he should not be
76 punished for contempt of court herein.

Said supplemental response is in the words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT, Defendants. } Supplemental Response.

& consolidated case.

For supplemental response the City of Newport and the mayor and members of the board of councilmen respectfully show to this honorable court:

1. That on the — day of July, 1891, and after the finding and adjudication of this court herein that they were guilty of a contempt, an appeal to the court of appeals from said finding and adjudication was duly granted out of the clerk's office of the court of appeals, and a bond to supersede said finding and adjudication, with good and sufficient surety, was duly executed before said clerk and accepted by him and a supersedeas by him duly issued and executed upon the Newport Light Company by the sheriff of Campbell county, and a copy thereof was duly lodged with the clerk of this honorable court, and remains of record in the papers of this cause, and said supersedeas is in full force and said appeal pending and undetermined.

2. And that on the 19th day of July, 1891, without the knowledge, consent, procurement, or connivance of these respondents or any of them, one Frank Kelly, alleging that he was a
77 tax-payer of the city of Newport, began in the Campbell chancery court his certain suit in equity against all of these respondents and the Newport Light Company and the Suburban Electric Illuminating, Heating and Power Company to cause said companies to interplead between themselves concerning the lighting of the city of Newport, and therein at his instance and without notice an order of injunction out of the clerk's office of said court was on said day duly issued, enjoining and restraining these respondents until the further order of said court from rescinding either the contract with the Suburban Electric Illuminating, Heat-

ing and Power Company or the discontinuance of the Newport Light Company's gas, which were complained of by the Newport Light Company in this proceeding, and said order remains in full force; and respondents say that said order was executed upon them on the evening of said day when the said members of the board of councilmen were about to in good faith convene as such board in special session, pursuant to a call of the said mayor, to rescind as ordered by said finding and adjudication of this honorable court.

Wherefore the respondents pray that this proceeding be held up by the court until the disposition of said supersedeas and until such time as these respondents can rescind as aforesaid without being guilty of a contempt of the Campbell chancery court in disobeying its said injunction.

JOHN P. NEWMAN,
C. J. HELM &
HALLAM & MYERS,
Att'ys for Respondents.

78 Said affidavit of John A. Williamson is in the words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY
vs.
CITY OF NEWPORT.

DUEBER LIGHT COMPANY
vs.
NEWPORT LIGHT COMPANY.

} Consolidated Cases.

Affidavit.

John A. Williamson says he is the president of the Newport Light Company, *John A. Williamson says he is the president of the Newport Light Company*, and that since the rendition of the judgment of this court on the 13th day of July, 1891, in these consolidated cases adjudging the city of Newport and its mayor and board of councilmen guilty of contempt, other persons have been and are guilty of contempt of this court by aiding and abetting said city and its mayor and board of council- in the continuance of said contempt, in that one Frank A. Kelly, as plaintiff, and A. B. Champion, as his attorney, have filed and are prosecuting a suit in the Campbell chancery court against the city of Newport and its mayor and board of councilmen, in which said action they have obtained an injunction which is still in force against said city and its mayor and board of councilmen, restraining and enjoining them and each of them from complying with the judgment of this court.

A certified copy of the petition in said action and the in-
79 junction therein granted is filed herewith as "Exhibit A," and that one Chas. J. Helm is guilty of contempt of this court in that the said Chas. J. Helm on the 20th day of July, 1891,

took the petition aforesaid in person to John C. Schroll, clerk of the Campbell chancery court, and induced and procured the said Schroll, clerk as aforesaid, to grant said injunction, and that one George G. Hamilton *in* guilty of contempt of this court in that on the said 20th day of July, 1891, he signed the injunction bond of said plaintiff in said action.

Affiant further says that one John P. Newman and Henry Worthington are guilty of contempt of this court, in that the said Henry Worthington signed before the clerk of the court of appeals of Kentucky a supersedeas bond for the purpose of superseding the judgment of this court rendered in these actions on the 13th day of July, 1891, as aforesaid; a certified copy of said supersedeas bond is filed herewith as "Exhibit B;" and in that the said John P. Newman in person induced and procured the clerk of the court of appeals to issue a supersedeas superseding and staying all further proceedings by this court upon its said judgment of July 13th, 1891. A certified copy of said supersedeas is filed herewith as "Exhibit C."

JNO. A. WILLIAMSON.

Subscribed and sworn to by John A. Williamson before me this 3rd day of August, 1891.

HENRY H. DEPUTY,
Examiner for Campbell County, Kentucky.

80 Said exhibit marked "A" (being petition in equity in case No. 3965) is in the words and figures as follows, to wit:

Campbell Chancery Court.

FRANK A. KELLEY, Suing for His Own and the Common and General Interest of all the Property-owners and Tax-payers of the City of Newport, who are Numerous, Plaintiff,

vs.

THE NEWPORT LIGHT COMPANY, a Private Corporation; The Suburban Electric Illuminating, Heating and Power Company, a Private Corporation; The City of Newport, a Municipal Corporation, and Albert S Berry, its Mayor, and Benj. F. Keim, Jas. E. McCracken, Edward Enneking, Jas. Knoblach, Wm. Cassidy, Horner Eggleston, Phil. Ryan, John Halloran, Geo. Toppenhauer, Jno. Walls, M. Donelan, Jno. Schnorr, and James Dunigan, Members of its Board of Councilmen, Defendants.

Petition in Equity.

The plaintiff, Frank A. Kelley, sues for his own and the common and general interests and benefit of many persons, to wit, of all the property-owners and tax-payers of the city of Newport, and says

that said parties are very numerous and it is impracticable to
81 bring them before the court within a reasonable time, and
says that he is the owner of a large amount of property in said city and is subject to the payment of a large amount of money annually for municipal taxes of said city.

He further says that before the 23rd day of April, 1891, and afterward 'til July 1st, 1891, the defendant The City of Newport had illuminated its streets, lanes, alleys, and other public places with gas and gasoline purchased from the defendant The Newport Light Company at a cost of about $10,000.00 per year, payable out of said municipal taxes; that on said 23rd day of April, 1891, said city contracted with the defendant The Suburban Electric Illuminating, Heating and Power Company to light said places by electricity on and after said July 1st, 1891, at a cost of about $10,000.00 per year, payable as aforesaid, and at the same time ordered and directed that all the lamp posts for furnishing light for said places by said Newport Light Company *to* be discontinued from and after said 1st day of July, 1891, and tendered said company the original cost of said posts and fixtures; that on said 1st day of July, 1891, said Suburban Electric Illuminating, Heating and Power Company began to light said places by electricity and continues so to do, and claims and asserts its right so to do and to receive therefor*a* pay as aforesaid for a period of fifteen years, pursuant to said contract, and said Newport Light Company, notwithstanding said order and direction to discontinue and said tender, continues to and claims and asserts a right exclusive of all other persons and rights to light said
places by gas and gasoline for about fourteen years yet to
82 come and to receive pay therefor as aforesaid, and the defendants The City of Newport and Albert S. Berry, its mayor, and Jas. E. McCracken, Wm. Cassidy, Jno. Holleran, M. Donelan, Edward Enneking, Horner E*hh*leston, Geo. Tippenhauer, Jno. Schnoor, Benj. F. Keim, Phil. Ryan, Jas. Smith, Jno. Wall, and James Dunnigan, members of its board of councilmen, threaten and are about to and will *im*mediately, unless therefrom enjoined by this honorable court, rescind said order and direction to discontinue and pass an ordinance or resolution declaring said contract with the Suburban Electric Illuminating, Heating and Power Company rescind- without the consent of said company, and thereby cause a multiplicity of suits for the collection of monthly instalments of payments for said electric light, to the great and irremediable damage and injury of plaintiff and all said tax-payers.

And plaintiff says that said city had power and authority, under and by virtue of its contracts with the Newport Light Company, to discontinue said posts upon payment of their original cost with the requisite fixtures, and offered as aforesaid and is still ready and willing to pay the same, and had power and authority, by virtue of an act of the General Assembly entitled "An act to amend the charter of the city of Newport," approved April 17th, 1890, to make with said Electric Illuminating, Heating and Power Company the contract aforesaid, and said company, by virtue of an act entitled "An act to incorporate the Edison Electric Illuminating, Heating

and Power Company," approved the 9th day of April, 1891, and an act amendatory thereof, approved the 15th day of May, 1890,
83 (changing said name to "Suburban" in lieu of "Edison"), had power so to contract with said city, and by the contract so as aforesaid made between them the power of said city to light said places was and is exhausted.

Wherefore plaintiff prays that said companies be required to interplead with each other and with the city of Newport concerning their said claims, and that said city and its mayor and members of the board of councilmen be enjoined and restrained until the further order of the court from rescinding its contract with the Suburban Electric Illuminating, Heating and Power Company to light the streets, lanes, alleys, and other public places of said city by electricity and from passing an ordinance or resolution to rescind its order or direction that all lamp posts for furnishing light by gas or gasoline for said places be discontinued, and prays judgment that said injunction be made perpetual and for his costs and all proper relief.

FRANK A. KELLEY.

The affiant, Frank A. Kelley, says that the injunction herein prayed for has not been refused by the court or circuit or other judge, and that irreparable injury will result to affiant if the injunction above prayed for be not immediately granted.

FRANK A. KELLEY.

Subscribed and sworn to by Frank A. Kelley before me this 20th day of July, 1891.

JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

84 STATE OF KENTUCKY:

Campbell Chancery Court.

FRANK A. KELLEY
vs.
NEWPORT LIGHT COMPANY. } Order. Injunction.

The defendants, City of Newport, Albert S. Berry, James E. McCracken, Edward Enneking, James Knoblach, Benj. F. Keim, Wm. Cassidy, Horner Eggleston, Geo. Tippenhauer, Jno. Schnorr, Jno. Holleran, M. Donelan, Phil. Ryan, Jac. Smith, Jno. Wall, James Dunigan, are enjoined and restrained until the further order of court from rescinding its contract with the Suburban Electric Illuminating, Heating and Power Co. to light the streets, lanes, alleys, and other public places of said city by electricity and from passing any ordinance or resolution to rescind its order or direction that all lamp posts for furnishing light by gas or gasoline for said places be discontinued.

Given under my hand this 20th day of July, 1891.

JOHN C. SCHROLL,
Clerk Campbell Chancery Court.

A copy.
Attest: JOHN C. SCH-OLL, *Clk*,
By A. L. LENSCJER, *D. C.*

Campbell Chancery Court.

FRANK A. KELLEY, Plaintiff,
against
NEWPORT LIGHT COMPANY & Others, Defendants. } Injunction Bond.

We undertake that the plaintiff, Frank A. Kelley, shall pay to the defendants, City of Newport, Albert S. Berry, James
85 E. McCracken, Edward Enneking, Benj. F. Keim, Jac. Smith, Wm. Cassidy, Horner Eggleston, Jas. Knoblach, Jno. Wall, James Holleran, Geo. Tippenhauer, M. Donelan, Jno. Schnorr, Phil. Ryan, and James Dunigan, the damages which they may sustain by reason of the injunction in this action, if it be finally decided that said injunction ought not to have been granted.

Witness our hands this 20th day of July, 1891.

GEO. G. HAMILTON.

Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

A copy.
Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

Campbell Chancery Court.

FRANK A. KELLEY
against
NEWPORT LIGHT COMPANY and Others. } Bond for Costs.

We undertake that the plaintiff, Frank A. Kelley, shall pay to the defendant- and to the officers of the law all costs that may accrue to them herein, either in this court or any other to which this action may be carried.

Witness our hands this 20th day of July, 1891.

GEO. G. HAMILTON.

Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

A copy.
Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

86 Said exhibit marked "B" (being supersedeas bond) is in the words and figures as follows, to wit:

Court of Appeals of Kentucky.

CITY OF NEWPORT, A. S. BERRY, Mayor, & P. J. Ryan & Others, Members of the Board of Councilmen of the City of Newport, Appellants,
against
NEWPORT LIGHT CO., Appellee. } Supersedeas Bond.

Whereas said appellants have taken an appeal from a judgment of the Louisville law and equity court rendered on July 13th, 1891,

against them in favor of the appellee, overruling the demurrer and exceptions of respondents to rule and affidavit, and sustaining the demurrer to their response, and adjudging said response insufficient, and adjudging "that the acts set forth in the affidavit herein constitute a violation of the injunction hereinbefore granted in these causes," &c., and ordering said respondents "to rescind and *said* aside before the said 24th day of July, 1891, the resolution passed on the 23rd day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company." &c., and ordering the "city of Newport" to continue to take gas from said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between the said city of Newport and the said company, dated June 3, 1880, and the appellant- desire to supersede said judgment:

Now, we, City of Newport, A. S. Berry and P. J. Ryan, and others, members of the board of councilmen of the city of Newport,
87 principals, and H. Worthington, securit*ies*, covenant to and agree with the appellee, Newport Light Co., that the appellant- will pay to the appellee all costs and damages that may be adjudged against the appellant- on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed or any judgment or order which the court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 17th day of July, 1891.

HENRY WORTHINGTON,
By his attorney-in-fact, JOHN P. NEWMAN.

Attest: A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Copy.
At.: A. ADDAMS, *C. C. C.*,
By ROB'T L. GREENE, *D. C.*

Said exhibit marked "C" (certified copy of supersedeas) is in the words and figures as follows, to wit:

STATE OF KENTUCKY,
CLERK'S OFFICE OF THE COURT OF APPEALS.

As clerk of the court of appeals of the State aforesaid, I certify that an appeal has been granted, according to law, from a judgment obtained by Newport Light Company against City
88 of Newport, &c., sustaining demurrer to response and adjudging response insufficient and that the acts of appellants were a violation of the injunction and ordering a rescission of the contract and ordering the city council to set aside resolution passed on April 23rd, 1891, and to continue to take gas from the appellee,

&c., in the Louisville law and equity court on July 13, 1891, in a certain petition, and that a supersedeas bond has been executed. Wherefore the appellee and all others are hereby commanded to stay proceedings on said judgment.

Witness A. Addams, clerk of the court of appeals, this 17th day of July, 1891.

A. ADDAMS, *C. C. C.*,
By ROB'T L. GREENE, *D. C.*

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of Louisville law and equity court, do hereby certify that the foregoing 49 pages, this included, contain a full, true, and complete transcript (from the filing of the affidavit of John A. Williamson, filed on the 7th of July, 1891, to and including the last order made in the case) of the record and proceedings had in said court, wherein Newport Light Company is plaintiff and City of Newport is defendant, #1607, as the same appears of record and on file in my said office.

Witness my hand this 15th day of August, 1891.

JNO. H. WELLER,
Cl'k Lou. Ch'y Ct & ex Officio
Cl'k Lou. Law & Eq'ty Ct.

89 At a court of appeals held in and for the State of Kentucky, at the capitol, in the city of Frankfort, on the 29th day of September, A. D. 1891, the following orders were made:

Order Filing Notice, &c.; Motion for Rule.

Louisville Law & Equity Ct.

CITY OF NEWPORT, &c.,
vs.
NEWPORT LIGHT CO.

Came the appellant, by counsel, and filed an affidavit and notice and grounds and moved the court for a rule against the appellee and J. A. Williamson requiring them to show cause why they should not be punished for contempt of this court in disregarding the supersedeas herein, and the cause is submitted on said motion.

The following is the notice filed by the foregoing order:

Notice.

To the Newport Light Company and John A. Williamson:

You will take notice that A. S. Berry and the individual members of the board of councilmen of the city of Newport will on Tuesday, September 30th, 1891, enter a motion in the court of appeals for a rule against each of you to show cause, *in* any you

against them in favor of the appellee, overruling the demurrer and exceptions of respondents to rule and affidavit, and sustaining the demurrer to their response, and adjudging said response insufficient, and adjudging "that the acts set forth in the affidavit herein constitute a violation of the injunction hereinbefore granted in these causes," &c., and ordering said respondents "to rescind and *said* aside before the said 24th day of July, 1891, the resolution passed on the 23rd day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company," &c., and ordering the "city of Newport" to continue to take gas from said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between the said city of Newport and the said company, dated June 3, 1880, and the appellant- desire to supersede said judgment:

Now, we, City of Newport, A. S. Berry and P. J. Ryan, and others, members of the board of councilmen of the city of Newport,
87 principals, and H. Worthington, securit*ies*, covenant to and agree with the appellee, Newport Light Co., that the appellant- will pay to the appellee all costs and damages that may be adjudged against the appellant- on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed or any judgment or order which the court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 17th day of July, 1891.

HENRY WORTHINGTON,
By his attorney-in-fact, JOHN P. NEWMAN.

Attest: A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Copy.
At.: A. ADDAMS, *C. C. C.*,
By ROB'T L. GREENE, *D. C.*

Said exhibit marked "C" (certified copy of supersedeas) is in the words and figures as follows, to wit:

STATE OF KENTUCKY,
CLERK'S OFFICE OF THE COURT OF APPEALS.

As clerk of the court of appeals of the State aforesaid, I certify that an appeal has been granted, according to law, from a judgment obtained by Newport Light Company against City
88 of Newport, &c., sustaining demurrer to response and adjudging response insufficient and that the acts of appellants were a violation of the injunction and ordering a rescission of the contract and ordering the city council to set aside resolution passed on April 23rd, 1891, and to continue to take gas from the appellee,

&c., in the Louisville law and equity court on July 13, 1891, in a certain petition, and that a supersedeas bond has been executed. Wherefore the appellee and all others are hereby commanded to stay proceedings on said judgment.

Witness A. Addams, clerk of the court of appeals, this 17th day of July, 1891.

A. ADDAMS, *C. C. C.*,
By ROB'T L. GREENE, *D. C.*

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of Louisville law and equity court, do hereby certify that the foregoing 49 pages, this included, contain a full, true, and complete transcript (from the filing of the affidavit of John A. Williamson, filed on the 7th of July, 1891, to and including the last order made in the case) of the record and proceedings had in said court, wherein Newport Light Company is plaintiff and City of Newport is defendant, #1607, as the same appears of record and on file in my said office.

Witness my hand this 15th day of August, 1891.

JNO. H. WELLER,
Cl'k Lou. Ch'y C't & ex Officio
Cl'k Lou. Law & Eq'ty C't.

89 At a court of appeals held in and for the State of Kentucky, at the capitol, in the city of Frankfort, on the 29th day of September, A. D. 1891, the following orders were made:

Order Filing Notice, &c.; Motion for Rule.

Louisville Law & Equity C't.

CITY OF NEWPORT, &c.,
vs.
NEWPORT LIGHT CO.

Came the appellant, by counsel, and filed an affidavit and notice and grounds and moved the court for a rule against the appellee and J. A. Williamson requiring them to show cause why they should not be punished for contempt of this court in disregarding the supersedeas herein, and the cause is submitted on said motion.

The following is the notice filed by the foregoing order:

Notice.

To the Newport Light Company and John A. Williamson:

You will take notice that A. S. Berry and the individual members of the board of councilmen of the city of Newport will on Tuesday, September 30th, 1891, enter a motion in the court of appeals for a rule against each of you to show cause, *in* any you

can, why you should not be punished for contempt of that court in disregarding its supersedeas in the case of City of Newport and said A. S. Berry and the others against the Newport Light Company, a copy of which supersedeas was duly served on the Newport Light Company September 19th, 1891.

T. P. CAROTHERS,
JOHN P. NEWMAN,
HALLAM & MYERS AND
C. J. HELM,
For A. S. Berry, &c.

90 The affidavit and grounds filed by the foregoing order are as follows:

Affidavit.

Court of Appeals of Kentucky, September Term, 1891.

THE CITY OF NEWPORT & A. S. BERRY & Others, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee.
} Motion and Affidavit.

The appellants respectfully show to this honorable court that before the 13th day of July, 1891, the appellee and one Jno. A. Williamson, its president, filed in the Louisville law and equity court a certain information charging that these appellants were guilty of contempt of said court in that they had contracted with a certain corporation, to wit, the Suburban Electric Illuminating, Heating and Power Company, to light the streets of the city of Newport by electricity, and in ordering a discontinuance of the use of gas of The Newport Light Company, appellee, for such illuminating after the first day of July, 1891; and thereupon the appellee and said John A. Williamson, its president, caused a certain rule to issue from the Louisville law and equity court against these appellants, requiring them to show cause to said court why they should not be punished for said alleged contempt, and therein caused and order to be made by said court on the 13th day of July, 1891, adjudging these appellants guilty of contempt as aforesaid, and ordering them to rescind said alleged contract with said illuminating company, and to rescind said order of discontinuance of gas before the 24th day of July, 1891, to which judgment and order
91 these appellants excepted, and thereafter, on the 17th day of July, 1891, these appellants prayed out of the clerk's office of this honorable court and obtained an appeal from said judgment and order and caused said order and judgment to be duly superseded, which said appeal is still pending and undetermined in this court, and they say that said supersedeas was then immediately executed by delivering a copy to the said John A. Williamson, president of appellee. Notwithstanding the same, the appellee and said John A. Williamson continued to prosecute said proceeding in the Louisville law and equity court against these appellants, and therein caused the said court on the 4th day of August, 1891, to

adjudge insufficient the response of these appellants setting forth the pendency of said appeal and supersedeas, and thereafter, on the 18th day of September, 1891, the same being more than sixty days after the entry of said judgment and order that these appellants were in contempt and said order to rescind, these appellants again prayed an appeal and supersedeas as aforesaid, the said Louisville law and equity court having meantime denied an appeal prayed therein.

And they say that on the 4th day of August, 1891, the appellee and said John A. Williamson has caused an order of the Louisville law and equity court to be made in said proceeding that these appellants respond further therein by the 25th day of September, 1891, and they say that on the said 25th day of September, 1891, they did respond further, and therein set forth to the Louisville law and equity court the pendency of said last-named appeal and
92 supersedeas, and filed in said court a copy of said supersedeas and caused the same to be executed by delivering a copy to said John A. Williamson. Notwithstanding same, the appellee and said John A. Williamson did continue and do continue to prosecute said proceeding against these appellants, and on said day after the execution of supersedeas as aforesaid and after the filing of said last-named response the appellee and said John A. Williamson caused an order of the Louisville law and equity court to be made that these appellants respond further by the 20th day of October, 1891, and caused an attachment to be issued out of said court in said proceeding and are prosecuting the same to cause these appellants, other than The City of Newport, to be arrested and taken in arrest to Louisville, to appear before said court on the 20th day of October, 1891, there to be dealt with by said court for said alleged contempt and for failing to rescind as aforesaid; and they say that appellee and said John A. Williamson are prosecuting said proceeding, notwithstanding supersedeas as aforesaid, and they say that said proceeding is for an enforcement of a civil right claimed by appellee, and for no other purpose.

Wherefore they pray that a rule issue from this court against the appellee and said John A. Williamson, returnable to such time as to the court may seem proper, requiring them and each of them to show cause, if any they can, why they should not be punished for contempt of this honorable court in so proceeding under said judgment and order of the Louisville law and equity court while same remains superseded and appeal therefrom pending in this honorable court.

93 STATE OF KENTUCKY, }
Campbell County, } *sct:*

A. S. Berry says he is one of the appellants above named, and the statements of fact contained in the foregoing motion are true.

A. S. BERRY.

Subscribed and sworn to by A. S. Berry before me this 26th day of September, 1891.

HOWARD BALL,
Examiner C. C., Ky.

Afterwards, at a court of appeals held as aforesaid on October 1, 1891, the following orders were entered:

Rule against Appellee for Contempt.

The court being sufficiently advised, it is considered that the motion for a rule herein be sustained, and a rule is ordered to issue against the appellee and John A. Williamson requiring them to show cause, if any they have or can, why they should not be punished for contempt of this court in disobeying the supersedeas issued herein.

Appearance to Rule; Time to Respond.

Came then the appellee and John A. Williamson, by counsel, and entered their appearance to the said rule, and on their motion they are given until Monday, the 12th day of October, 1891, to respond to the said motion.

Afterwards, at a court of appeals held as aforesaid on October 13th, 1891, the following orders were entered herein:

Motion to Make Rule Absolute.

Came the appellants, by counsel, and moved the court to make the rule herein absolute.

94 *Order Filing Response; Order — File Notice, &c., &-; Motion to Dismiss.*

Came then the appellee and John A. Williamson, by counsel, and filed a response to the rule, and also filed a notice and grounds and moved the court to dismiss the appeal herein.

To which motion the appellants object, and the cause is submitted on the response and the said motion.

The response filed by the foregoing order is as follows:

Response to Rule.

Court of Appeals of Kentucky.

CITY OF NEWPORT *et als.*, Appellants,
vs.
NEWPORT LIGHT CO., Appellee. } Response to Rule.

The Newport Light Co. and John A. Williamson, for response to the rule herein, say that on the 18th day of July, 1885, *in* the Louisville law and equity court, in an action therein pending between the Newport Light Co. and the City of Newport, rendered a judgment per-

petually enjoining and restraining the city of Newport and its officers and agents from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings, or places of the city of Newport with gas or otherwise during the existence of the contract between the city of Newport and the Newport Light Co., and from discontinuing the taking of gas from the Newport Light Co. for the lighting of said places, in such quantities as may be required for that purpose, according to contract between the said parties as long as said contract shall remain in force. Said contract, by its terms, is to remain in force until June 1, 1907.

From the said judgment the city of Newport prayed an
95 appeal to this court, and afterwards, on the — day of ——, 188–, the same was affirmed. A transcript of the record of said cause is on file in this court and is hereby referred to and made part hereof. Respondents say that The City of Newport and all the other appellants herein have failed and refused, and still fail and refuse, to obey the said judgment, and that on the 13th day of July, 1891, the Louisville law and equity court made an interlocutory order requiring them to set aside and annul the contract made with the Suburban Electric Illuminating, Heating and Power Co., which contract was made in violation of said injunction, to cease to light or have lighted the streets, lanes, alleys, public buildings, or places of the city of Newport under said contract, and to rescind and set aside, on or before the 24 day of July, 1891, the resolution passed on the 23 day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Co.; and the respondents say that no other or final judgment or order has yet been made by the said court in the said proceedings.

Respondents say that on the 25 day of September, 1891, the attorney of the Newport Light Co., being present in the Louisville law and equity court when the appellants offered to file a supplemental response and a copy of the supersedeas, objected to the filing of the same, but the court overruled the objection and allowed the supplemental response to be filed; and thereupon the said court, without any other motion upon the part of the Newport Light —, but of its own motion, ordered an attachment to be issued against the appellants.

96 A certified copy of said proceedings is filed herewith as part hereof. The respondent John A. Williamson was not present when said order was made and had no knowledge of the same for ten days thereafter.

JOHN A. WILLIAMSON.

John A. Williamson says he is president of the Newport Light Co. and that the statements contained in the foregoing response are true.

JOHN A. WILLIAMSON.

Sworn to before me by John A. Williamson this 13 day Oct., 1891.

ROB'T L. GREENE, *D. C. C. A.*

The copy of proceedings had in Louisville law and equity court from Aug. 4 to Sept. 25, 1891, referred to in response, is in words and figures following, to wit:

Record of Proceedings in Law & Equity Ct from Aug. 4 to Sept. 25, 1891.

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

DUEBER LIGHT CO.)
vs.) = 1606.
CITY OF NEWPORT.)

NEWPORT LIGHT CO.)
vs.) = 1607.
CITY OF NEWPORT.)

Pleas before the honorable judge of the Louisville law and equity court, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

97 Be it known that heretofore, to wit, at a court held for the court aforesaid on the 4th day of August, 1891—

NEWPORT LIGHT COMPANY)
vs.) = 1607.
CITY OF NEWPORT.)

DUEBER LIGHT CO.)
vs.) = 1606.
NEWPORT LIGHT CO.)

Came the City of Newport and A. S. Berry, the mayor, and the members of the board of councilmen of said city of Newport, and prayed the court to grant an appeal from the judgment of this court of July 13th, 1891, adjusging said city, mayor, and board of councilmen guilty of contempt of this court, and the court refuses to grant the appeal, and the said city, mayor, and members of the board of councilmen except.

Came the City of Newport and the mayor and members of the board of councilmen of said city of Newport and filed a supplemental response herein which is adjudged to be insufficient; to which said City of Newport, the mayor, and members of the board of councilmen except, and time until 25th September, 1891, is given them to obey the order of July 13th, 1891, herein.

Came Newport Light Company, by counsel, and filed herein the affidavit of John A. Williamson and Exhibits "A," "B," and "C" herein.

And a rule is awarded it against Frank A. Kelly, returnable September 25th, 1891, to show cause why he should not be punished for contempt of court herein.

Said supplemental response of the City of Newport and the mayor and members of the board of councilmen is in the words and figures as follows, to wit:

Louisville Law and Equity Court.

98 NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT, Defendants. } Supplemental Response.

& consolidated case.

For supplemental response the City of Newport and the mayor and members of the board of councilmen thereof respectfully show to this honorable court—

1. That on the — day of July, 1891, and after the finding and adjudication of this court herein that they were guilty of a contempt, an appeal to the court of appeals from said finding and adjudication was duly granted out of the clerk's office of the court of appeals, and a bond to supersede said finding and adjudication, with good and sufficient surety, was duly executed before said clerk and accepted by him, and a supersedeas by him duly issued and executed upon the Newport Light Company by the sheriff of Campbell county, and a copy thereof was duly lodged with the clerk of this honorable court and remains of record in the papers of this cause, and said supersedeas is in full force and said appeal pending and undetermined.

2. And that on the 19th day of July, 1891, without the knowledge, consent, procurement, or connivance of these respondents or any of them, one Frank Kelly, alleging that he was a tax-payer of the city of Newport, began in the Campbell chancery court his certain suit in equity against all of these respondents and the Newport Light Company and the Suburban Electric Illuminating, Heating and Power Company to cause said companies to interplead
99 between themselves concerning the lighting of the city of Newport, and therein, at his instance and without notice, an order of injunction out of the clerk's office of said court was on said day duly issued, enjoining and restraining these respondents until the further order of said court from rescinding either the contract with the Suburban Electric Illuminating, Heating and Power Company or the discontinuance of the Newport Light Company's gas, which were complained of by the Newport Light Company in this proceeding, and said order remains in full force, and respondents say that said order was executed upon them on the evening of said day when the said members of the board of councilmen were about to, in good faith, convene as such board in special session pursuant to a call of the said mayor to rescind as ordered by said finding and adjudication of this honorable court.

Wherefore the respondents pray that this proceeding be held up by the court until the disposition of said supersedeas and until such time as these respondents can rescind as aforesaid without being

guilty of a contempt of the Campbell chancery court in disobeying its said injunction.

JNO. P. NEWMAN,
C. J. HELM &
HALLAM & MYERS,
Att'ys for Respondents.

Said affidavit of John A. Williamson is in the words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY
vs.
100 CITY OF NEWPORT.
DUEBER LIGHT COMPANY
vs.
NEWPORT LIGHT COMPANY.
} Consolidated Cases.

Affidavit.

John A. Williamson says he is the president of the Newport Light Company, and that since the rendition of the judgment of this court on the 13th day of July, 1891, in these consolidated cases adjudging the city of Newport and its mayor and board of councilmen guilty of contempt, other persons have been and are guilty of contempt of this court by aiding and abetting said city and its mayor and board of councilmen in the continuance of said contempt, in that one Frank A. Kelly, as plaintiff, and A. B. Champion, as his attorney, have filed and are prosecuting a suit in the Campbell chancery court against the city of Newport and its mayor and board of councilmen, in which said action they have obtained an injunction, which is still in force against said city and its mayor and board of councilmen, restraining and enjoining them and each of them from complying with the judgment of this court. A certified copy of the petition in said action and the injunction therein granted is filed herewith as "Exhibit A," and that one Chas. J. Helm is guilty of contempt of this court in that the said Chas. J. Helm, on the 20th day of July, 1891, took the petition aforesaid in person to John C. Schroll, clerk of the Campbell chancery court, and induced and procured the said Schroll, clerk as aforesaid, to grant said injunction, and that one George G. Hamilton is
101 guilty of contempt of this court, in that on the said 20th day of July, 1891, he signed the injunction bond of said plaintiff in said action.

Affiant further says that one John P. Newman and Henry Worthington are guilty of contempt of this court, in that the said Henry Worthington signed before the clerk of the court of appeals of Kentucky a supersedeas bond for the purpose of superseding the judgment of this court rendered in these actions on the 13th day of July, 1891, as aforesaid; a certified copy of said supersedeas bond is

filed herewith as "Exhibit B;" and in that the said John P. Newman in person induced and procured the clerk of the court of appeals to issue a supersedeas superseding and staying all further proceedings by this court upon its said judgment of July 13th, 1891.

A certified copy of said supersedeas is filed herewith as "Exhibit C."

JNO. A. WILLIAMSON.

Subscribed and sworn to by John A. Williamson before me this 3rd day of August, 1891.

HARRY H. DEPUTY,
Examiner for Campbell County, Kentucky.

Said Exhibit "A" (being certified copy of petition) is in the words and figures as follows, to wit:

Louisville Chancery Court.

FRANK A. KELLEY, Suing for His Own and the Common and General Interest
102 of all the Property-owners and Tax-payers of the City of Newport, who are Numerous, Plaintiff,
vs.
THE NEWPORT LIGHT COMPANY, a Private Corporation; The Suburban Electric Illuminating, Heating and Power Company, a Private Corporation; The City of Newport, a Municipal Corporation, and Albert S. Berry, Its Mayor, and Benj. F. Keim, Jas. E. McCracken, Edward Enneking, Jas. Knoblach, Wm. Cassidy, Horner Eggleston, Phill. Ryan, John Holleran, Geo. Tippenhauer, Jno. Walls, M. Donelan, Jno. Schnorr, and James Dunigan, Members of Its Board of Councilmen, Defendants. } Petition in Equity.

The plaintiff, Frank A. Kelley, sues for his own and the common and general interests and benefit of many persons, to wit, of all the property-owners and tax-payers of the city of Newport, and says that said parties are very numerous and it is impracticable to bring them before the court within a reasonable time, and says that he is the owner of a large amount of property in said city and is subject to the payment of a large amount of money actually for municipal taxes of said city.

He further says that before the 23rd day of April, 1891, and afterward 'til July 1st, 1891, the defendant The City of Newport had illuminated its streets, lanes, alleys, and other public
103 places with gas and gasoline purchased from the defendant The Newport Light Company at a cost of about $10,000.00 per year, payable out of said municipal taxes; that on said 23rd

day of April, 1891, said city contracted with the defendant The Suburban Electric Illuminating, Heating and Power Company to light said places by electricity on and after said July 1st, 1891, at a cost of about $10,000.00 per year, payable as aforesaid, and at the same time ordered and directed that all the lamp posts for furnishing light for said places by said Newport Light Company *to* be discontinued from and after said 1st day of July, 1891, and tendered said company the original cost of said posts and fixtures; that on said 1st day of July, 1891, said Suburban Electric Illuminating, Heating and Power Company began to light said places by electricity and continues so to do, and claims and asserts its right so to do and to receive therefore pay as aforesaid for a period of fifteen years, pursuant to said contract, and said Newport Light Company, notwithstanding said order and direction to discontinue and said tender, continues to and claims and asserts a right exclusive of all other persons and rights to light said places by gas and gasoline for about fourteen years yet to come and to receive pay therefor as aforesaid, and the defendants The City of Newport and Albert S. Berry, its mayor, and Jas. E. McCracken, Wm. Cassiday, Jno. Holleran, M. Donelan, Edward Enneking, Horner Eggleston, Geo. Tippenhauer, Jno. Schnoor, Benj. F. Keim, Phil. Ryan, Jas. Smith, Jno. Wall, and James Dunigan, members of its board of councilmen, threaten and are about to and will immediately, unless therefrom enjoined by this honorable court, rescind said order and direction to discontinue and pass an ordinance or resolution declaring said contract with the Suburban Electric Illuminating, Heating and Power Company rescinded without the consent of said company, and thereby cause a multiplicity of suits for the collection of monthly instalments of payments for said electric light, to the great and irremediable damage and injury of plaintiff and all said tax-payers.

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And plaintiff says that said city had power and authority, under and by virtue of its contracts with the Newport Light Company, to discontinue said posts upon payment of their original cost, with the requisite fixtures, and offered as aforesaid and is still ready and willing to pay same, and had power and authority, by virtue of an act of the General Assembly entitled "An act to amend the charter of the city of Newport," approved April 17th, 1890, to make with said Electric Illuminating, Heating and Power Company the contract aforesaid, and said company, by virtue of an act entitled "An act to incorporate the Edison Electric Illuminating, Heating and Power Company" approved the 9th day of April, 1891, and an act amendatory thereof, approved the 15th day of May, 1890 (changing aid name to "Suburban" in lieu of "Edison"), had power so to contract with said city, and by the contract so as aforesaid made between them the power of said city to light said places was and is exhausted.

Wherefore plaintiff prays that said companies be required to interplead with each other and with the city of Newport concerning their said claims, and that said city and its mayor and members of the board of councilmen be enjoined and

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restrained until the further order of court from rescinding its contract with the Suburban Electric Illuminating, Heating and Power Company to light the streets, lanes, alleys, and other public places of said city by electricity, and from passing an ordinance or resolution to rescind its order or direction that all lamp posts for furnishing light by gas or gasoline for said places be discontinued, and prays judgment that said injunction be made perpetual and for his costs and all proper relief.

FRANK A. KELLEY.

The affiant, Frank A. Kelley, says that the injunction herein prayed for has not been refused by the court or circuit or other judge, and that irreparable injury will result to affiant if the injunction above prayed for be not immediately granted.

FRANK A. KELLEY.

Subscribed and sworn to by Frank A. Kelley before me this 20th day of July, 1891.

JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

STATE OF KENTUCKY:

Campbell Chancery Court.

FRANK A. KELLEY
vs.
NEWPORT LIGHT COMPANY. } Order. Injunction.

The defendants, City of Newport, Albert S. Berry, James E. McCracken, Edward Emeking, James Knoblach, Benj. F. Keim, Wm. Cassidy, Horner Eggleston, Geo. Tippenhauer, Jno. Schnoor,
106 Jno. Holleran, M. Donelan, Phil. Ryan, Jac. Smith, Jno. Wall, James Dunigan, are enjoined and restrained until the further order of court from rescinding its contract with the Suburban Electric Illuminating, Heating and Power Co. to light the streets, lanes, alleys, and other public places of said city by electricity and from passing any ordinance or resolution to rescind its order or direction that all lamp posts for furnishing light by gas or gasoline for said places be discontinued.

Given under my hand this 20th day of July, 1891.

JOHN C. SCHROLL,
Clerk Campbell Chancery Court.

A copy.
Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

Campbell Chancery Court.

FRANK A. KELLY, Plaintiff,
against
NEWPORT LIGHT COMPANY & Others, Defendants. } Injunction Bond.

We undertake that the plaintiff, Frank A. Kelley, shall pay to the defendants, City of Newport, Albert S. Berry, James E. Mc-

day of April, 1891, said city contracted with the defendant The Suburban Electric Illuminating, Heating and Power Company to light said places by electricity on and after said July 1st, 1891, at a cost of about $10,000.00 per year, payable as aforesaid, and at the same time ordered and directed that all the lamp posts for furnishing light for said places by said Newport Light Company *to* be discontinued from and after said 1st day of July, 1891, and tendered said company the original cost of said posts and fixtures; that on said 1st day of July, 1891, said Suburban Electric Illuminating, Heating and Power Company began to light said places by electricity and continues so to do, and claims and asserts its right so to do and to receive therefore pay as aforesaid for a period of fifteen years, pursuant to said contract, and said Newport Light Company, notwithstanding said order and direction to discontinue and said tender, continues to and claims and asserts a right exclusive of all other persons and rights to light said places by gas and gasoline for about fourteen years yet to come and to receive pay therefor as aforesaid, and the defendants The City of Newport and Albert S. Berry, its mayor, and Jas. E. McCracken, Wm. Cassiday, Jno. Holleran, M. Donelan, Edward Emeking, Horner Eggleston, Geo. Tippenhauer, Jno. Schnoor, Benj. F. Keim, Phil. Ryan, Jas. Smith, Jno. Wall, and James Dunigan, members of its board of councilmen, threaten and are about to and will immediately, unless therefrom enjoined by this honorable court, rescind said order and direction to discontinue and pass an ordinance or resolution declaring said contract with the Suburban Electric Illuminating, Heating and Power Company rescinded without the consent of said company, and thereby cause a multiplicity of suits for the collection of monthly instalments of payments for said electric light, to the great and irremediable damage and injury of plaintiff and all said tax-payers.

104

And plaintiff says that said city had power and authority, under and by virtue of its contracts with the Newport Light Company, to discontinue said posts upon payment of their original cost, with the requisite fixtures, and offered as aforesaid and is still ready and willing to pay same, and had power and authority, by virtue of an act of the General Assembly entitled "An act to amend the charter of the city of Newport," approved April 17th, 1890, to make with said Electric Illuminating, Heating and Power Company the contract aforesaid, and said company, by virtue of an act entitled "An act to incorporate the Edison Electric Illuminating, Heating and Power Company" approved the 9th day of April, 1891, and an act amendatory thereof, approved the 15th day of May, 1890 (changing said name to "Suburban" in lieu of "Edison"), had power so to contract with said city, and by the contract so as aforesaid made between them the power of said city to light said places was and is exhausted.

Wherefore plaintiff prays that said companies be required to interplead with each other and with the city of Newport concerning their said claims, and that said city and its mayor and members of the board of councilmen be enjoined and

105

restrained until the further order of court from rescinding its contract with the Suburban Electric Illuminating, Heating and Power Company to light the streets, lanes, alleys, and other public places of said city by electricity, and from passing an ordinance or resolution to rescind its order or direction that all lamp posts for furnishing light by gas or gasoline for said places be discontinued, and prays judgment that said injunction be made perpetual and for his costs and all proper relief.

FRANK A. KELLEY.

The affiant, Frank A. Kelley, says that the injunction herein prayed for has not been refused by the court or circuit or other judge, and that irreparable injury will result to affiant if the injunction above prayed for be not immediately granted.

FRANK A. KELLEY.

Subscribed and sworn to by Frank A. Kelley before me this 20th day of July, 1891.

JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

STATE OF KENTUCKY:

Campbell Chancery Court.

FRANK A. KELLEY
vs.
NEWPORT LIGHT COMPANY. } Order. Injunction.

The defendants, City of Newport, Albert S. Berry, James E. McCracken, Edward Enneking, James Knoblach, Benj. F. Keim, Wm. Cassidy, Horner Eggleston, Geo. Tippenhauer, Jno. Schnoor, Jno. Holleran, M. Donelan, Phil. Ryan, Jac. Smith, Jno. Wall, James Dunigan, are enjoined and restrained until the further order of court from rescinding its contract with the Suburban Electric Illuminating, Heating and Power Co. to light the streets, lanes, alleys, and other public places of said city by electricity and from passing any ordinance or resolution to rescind its order or direction that all lamp posts for furnishing light by gas or gasoline for said places be discontinued.

106

Given under my hand this 20th day of July, 1891.

JOHN C. SCHROLL,
Clerk Campbell Chancery Court.

A copy.
Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

Campbell Chancery Court.

FRANK A. KELLY, Plaintiff,
against
NEWPORT LIGHT COMPANY & Others, Defendants. } Injunction Bond.

We undertake that the plaintiff, Frank A. Kelley, shall pay to the defendants, City of Newport, Albert S. Berry, James E. Mc-

Cracken, Edward Enneking, Benj. F. Keim, Jac. Smith, Wm. Cassidy, Horner Eggleston, Jas. Knoblach, Jno. Wall, James Holleran, Geo. Tippenhauer, M. Donelan, Jno. Schnorr, Phil. Ryan, and James Dunigan, the damages which they may sustain by reason of the injunction in this action if it be finally decided that said injunction ought not to have been granted.

Witness our hands this 20th day of July, 1891.

GEO. G. HAMILTON.

107 Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

A copy.
Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

Campbell Chancery Court.

FRANK A. KELLEY
against
NEWPORT LIGHT COMPANY and Others. } Bond for Costs.

We undertake that the plaintiff, Frank A. Kelley, shall pay to the defendant and to the officers of the law all costs that may accrue to them herein, either in this court or any other to which this action may be carried.

Witness our hands this 20th day of July, 1891.

GEO. G. HAMILTON.

Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

A copy.
Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

Said exhibit marked "B" (supersedeas bond) is in the words and figures as follows, to wit:

Court of Appeals of Kentucky.

108 CITY OF NEWPORT, A. S. BERRY, Mayor, & P. J. Ryan & Others, Members of the Board of Councilmen of City of Newport, Appellants,
against
NEWPORT LIGHT CO., Appellee. } Supersedeas Bond.

Whereas said appellants have taken an appeal from a judgment of the Louisville law and equity court rendered on July 13th, 1891, against them in favor of the appellee, overruling the demurrer and exceptions of respondents to rule and affidavit, and sustaining the demurrer to their response, and adjudging said response insufficient, and adjudging "that the acts set forth in the affidavit herein constitute a violation of the injunction hereinbefore granted in these causes," &c., and ordering said respondents "to rescind and *said*

aside before the said 24th day of July, 1891, the resolution passed on the 23rd day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company," &c., and ordering the "city of Newport" to continue to take gas from said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between the said city of Newport and the said company, dated June 3, 1880, and the appellant- desire to supersede said judgment:

Now, we, City of Newport, A. S. Berry and P. J. Ryan & others, members of the board of councilmen of the city of Newport, principals, and H. Worthington, securit*ies*, covenant to and agree with the appellee, Newport Light Co., that the appellant- will pay to the appellee all costs and damages that may be adjudged against the appellant- on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed or any judg-
109 ment or order which the court may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 17th day of July, 1891.

HENRY WORTHINGTON,
By his attorney-in-fact JOHN P. NEWMAN.

Attest: A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Copy.
Att.: A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Said exhibit marked "C" (copy of supersedeas) is in the words and figures as follows, to wit:

STATE OF KENTUCKY,
CLERK'S OFFICE OF THE COURT OF APPEALS.

As clerk of the court of appeals of the State aforesaid, I certify that an appeal has been granted according to law from a judgment obtained by Newport Light Company against City of Newport, &c., sustaining demurrer to response and adjudging response insufficient and that the acts of appellants were a violation of the injunction and ordering a rescission of the contract and ordering the city council to set aside resolution passed on April 23, 1891, and to continue to take gas from the appellee, &c., in the Louisville law and equity court on July 13, 1891, in a certain petition, and that a
110 supersedeas bond has been executed. Wherefore the appellee and all others are hereby commanded to stay proceedings on said judgment.

Witness A. Addams, clerk of the court of appeals, this 17th day of July, 1891.

A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

The following endorsement appears in lead pencil on said supersedeas:

Clerk court of appeals granted appeal, and supersedeas and summons issued and served. What do you suggest? Answer and write. R. W. Nelson.

At a court held for the court aforesaid on the 25th day of September, 1891—

DUEBER LIGHT CO. vs. NEWPORT LIGHT CO. } # 1607.

NEWPORT LIGHT CO. vs. CITY OF NEWPORT. } # 1606.

Came City of Newport, its mayor, and the members of the board of councilmen, by counsel, and filed a supplemental response and two exhibits and a supersedeas from clerk's office of court of appeals of Kentucky; to which Newport Light Co., by counsel, objected, and, said objection being overruled, it excepted.

And the court, being advised, adjudges said supplemental response insufficient; to which said respondents except.

And the rule herein against the following-named parties is now made absolute and an attachment is awarded against them, returnable October 20th, 1891, to answer for a contempt offered this court in disregarding its process and authority, viz., William Cassidy, James McCracken, John Halloran, Edward Enneking, James Knobloch, B. W. Keim, Phillip J. Ryan, Jacob Smith, James Dunnigan, John G. Wall, J. H. Egelston, and A. S. Berry.

Said attachment to be endorsed by the clerk. Bond in the sum of $200.00 may be taken.

Said supplemental response is in the words and figures as follows, to wit:

Louisville Law and Equity Court. In Equity.

THE NEWPORT LIGHT CO., Plaintiff, vs. THE CITY OF NEWPORT, Defendant. } (Supplemental Response.)

& consol. case.

The City of Newport, its mayor, and the members of the board of councilmen, for further supplemental response to the rule against them herein respectfully show to the court:

1. That they in good faith moved the Campbell chancery court at its September term, 1891, to dissolve the injunction issued out of the clerk's office of said court as set forth in the first supplemental response herein, and on the 18th day of September, 1891, said court did dissolve said injunction, but the same was on the 22nd day of said month reinstated by an order of one of the honorable judges of the court of appeals of Kentucky without the knowledge or

consent of these respondents, and said injunction remains in the same force and effect as at the last preceding hearing of this rule.

2. Respondents further say that on the 18th day of September, 1891, they prayed an appeal of the clerk of the court of ap-
112 peals from the adjudication of this honorable court made upon this rule July 14th, 1891, and the same was by him duly granted and bond was at the same time duly executed before him to supersede said adjudication and was by him duly accepted and supersedeas duly issued accordingly and executed by delivering a copy *of* the relator *in* this rule and lodging a copy in the clerk's office of this honorable court for filing in this case, and — remains in full force and effect, and said appeal is so pending and undetermined.

And they say that on the 13th day of this month they caused notice to be duly served on said relator that they would on the 22nd day of this month move the court of appeals to docket and advance said appeal, and by counsel were present in said court to make said motion, but said relator refrained to appear or manifest consent, and respondents could not, by the rules of said court, make any motion therein without such consent.

And they say that on the 23rd day of this month they attempted to serve on said relator a written request to consent to such docketing and advance, coupled with an offer to appear at any time to any motion said relator might make to dismiss said appeal, but that the absence of relator's president and attorneys from Campbell county prevented it.

Respondents file herewith as part hereof both of said writings with the returns on the former and show to this honorable court that they are ready and willing and desirous to have the court of appeals promptly dispose of said appeal, and hereby tender
113 and offer to appear in said court at any time to any motion the said relator may make, and in any and every way to contribute to an immediate determination of any and every question relating to said appeal in order that they may not remain in even the appearance of contempt of this honorable court.

They therefore pray that this cause be retained by this honorable court without further proceeding until such time as by or without the co-operation or facilitation, active or passive, of the relator in this rule the court of appeals may at least dispose of the question whether the order of this honorable court is duly superseded.

HALLAM & MYERS,
T. P. NEWMAN,
THOS. P. CAROTHERS &
C. J. HELM,
Att'ys for Respondents.

THE STATE OF KENTUCKY, }
Campbell County, } *set:*

—— —— says he is one of the respondents above mentioned and believes the statements of the foregoing response are true.

—— ——.

Subscribed and sworn to before me by —— —— this — day of Sept., 1891.

—— ——.

Said exhibits are in the words and figures as follows, to wit:

114 Court of Appeals of Kentucky.

THE CITY OF NEWPORT, A. S. BERRY, *et al.*, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee. } Notice.

The appellee is hereby notified that the appellants will on Tuesday, September 22nd, 1891, move the court to docket this appeal and advance it for hearing.

HALLAM & MYERS,
NEWMAN & HELM,
Attorneys for Appellants.

Executed the within notice this 19th day of September, 1891, on the Newport Light Co. by delivering to John A. Williamson, its president and its chief officer, found in my county, a copy thereof.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

NEWPORT, KY., *Sept.* 23*rd*, 1891.

To the president and directors of the Newport Light Company.

GENTLEMEN: On the 18th day of September, 1891, the clerk of the court of appeals granted us an appeal from the judgment of the Louisville law and equity court rendered July 13th, 1891, in the cases of The Newport Light Company *vs.* City of Newport and The Dueber Light Company *vs.* The Newport Light Company.

You were served with notice on the 19th day of September, 1891, of a motion to be made — the court of appeals to docket and advance said case on the 22nd of September, 1891. On that
115 day we appeared in the court of appeals, but did not make the motion because of a rule of the court not to docket a cause except by consent of both parties. You were not represented and we would not ask that consent then. We now ask your consent to docket that appeal, and we offer to accept notice of any motion you may choose to make in the court of appeals at any time by which that court can pass on the question whether we have a right to appeal from the judgment of the Louisville law and equity court above mentioned.

We suggest that these motions be made to-morrow in the court of appeals. Our attorney, Mr. Helm, will await your answer until six o'clock this evening at his office, to arrange for any motion to-morrow, and all day to-morrow, if you choose another time.

Respectfully,
CITY OF NEWPORT,
A. S. BERRY AND
THE MEMBERS OF THE BOARD
OF COUNCILMEN,
By THOS. P. CAROTHERS &
C. J. HELM, *Their Attorneys.*

Said supersedeas from clerk's office of the court of appeals is in the words and figures as follows, to wit:

STATE OF KENTUCKY:

Clerk's office of the court of appeals.

As clerk of the court of appeals of the State aforesaid, I certify that an appeal has been granted according to law from a judgment obtained by Newport Light Company against City of Newport, &c., sustaining demurrer to response and adjudging response in-
116 sufficient, and that the acts of appellants were a violation of the injunction, and ordering a rescis-ion of the contract, and ordering the city counsel to set aside resolution passed on April 23, 1891, and to continue to take gas from the appellee, &c., in the Louisville law and equity court, on July 13th, term 1891, in a certain petition, and that a supersedeas bond has been executed. Wherefore the appellee and all others are hereby commanded to stay proceedings on said judgment.

Witness A. Addams, clerk of the court of appeals, this 18th day of September, 1891.

A. ADDAMS, *C. C. A.*

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk Louisville law and equity court, do hereby certify that the foregoing 20 pages contain a full, true, and complete transcript (from and including the 4th day of August, 1891) of the record and proceedings had in said court, wherein Dueber Light Co. is plaintiff and City of Newport is defendant, # 1606, and Newport Light Co. is plaintiff and City of Newport is defendant, # 1607, consolidated cases, as the same appears of record and on file in my said office.

Witness my hand this 9th day of October, 1891.

JNO. H. WELLER,
Cl'k Lou. Ch'y Ct & ex Officio Cl'k
Lou. Law & Eq'ty Ct.

117 The notice and grounds filed by the foregoing order are as follows:

Notice to Dismiss.

Court of Appeals of Kentucky.

CITY OF NEWPORT, &c., Appellants,
v.
NEWPORT LIGHT COMPANY, Appellee. } Notice.

The appellants, The City of Newport, A. S. Berry, P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, Wm. Cassidy, Jacob Smith, George Tippenhauer, Ed. Enneking, Jas.

Dunnigan, J. H. Eggleston, Jas. E. McCracken, John Schnorr, and Benj. Keim, will take notice that on Monday, the 13th day of October, 1891, the appellee, The Newport Light Company, will move the court of appeals of Kentucky to dismiss the above-styled appeal upon the grounds—

First. That the order appealed from is not a final order.

Second. That no appeal can be taken to the court of appeals to reverse a judgment punishing contempt, and that the granting of the appeal by the clerk of said court is void.

THE NEWPORT LIGHT COMPANY,
By NELSON & DESHA, *Att'ys.*

The above notice is accepted by appellants this 2nd October, 1891.

CHAS. J. HELM,
Of Counsel for Appellants.

Afterwards, at a court of appeals held as aforesaid on October 17th, 1891, the following order was entered:

Order — File Affidavit, &c., & Mot. for Rule vs. Judge Lower Court.

Came appellant, by counsel, and filed an affidavit and
118 grounds and moved the court for a rule against the Honorable Sterling B. Toney to show cause why he should not be punished for contempt in proceeding under the judgment and order of the Louisville law and equity court while said judgment and order remains superseded and appeal therefrom pending in this court; and the case is submitted on said motion.

The affidavit referred to in the foregoing order is as follows:

Court of Appeals of Kentucky, September Term, 1891.

THE CITY OF NEWPORT & A. S. BERRY & Others, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee.

(*Motion and Affidavit.*)

The appellants respectfully show to this honorable court that before the 13th day of July, 1891, the appellee and one John A. Williamson, its president, filed in the Louisville law and equity court a certain information charging that these appellants were guilty of contempt of said court, in that they had contracted with a certain corporation, to wit, the Suburban Electric Illuminating, Heating and Power Company, to light the streets of the city of Newport by electricity, and in ordering a discontinuance of the use of gas of The Newport Light Company, appellee, for such illuminating after the 1st day of July, 1891; and thereupon the appellee and said John A. Williamson, its president, caused a certain rule to issue from the Louisville law and equity court against these appellants, requiring
119 them to show cause to said court why they should not be punished for said alleged contempt and therein caused an order to be made by said court on the 13th day of July, 1891,

adjudging these appellants guilty of contempt as aforesaid and ordering them to rescind said contract with said illuminating company and to rescind said order of discontinuance of gas before the 24th day of July, 1891; to which judgment and order these appellants excepted; and thereafter, on the 17th day of July, 1891, these appellants prayed out of the clerk's office of this honorable court and obtained an appeal from said judgment and order and caused said judgment and order to be duly superseded; which said appeal is still pending and undetermined in this court; and they say that said supersedeas was then immediately executed by delivering a copy to the said John A. Williamson, president of appellee. Notwithstanding the same, the appellee and said John A. Williamson continued to prosecute said proceeding in the Louisville law and equity court against these appellants and therein caused the said court, on the 4th day of August, 1891, to adjudge insufficient the response of these appellants setting forth the pendency of said appeal and supersedeas; and thereafter, on the 18th day of September, 1891, the same being more than sixty days after the entry of said judgment and order that these appellants were in contempt and said order to rescind, these appellants again prayed an appeal and supersedeas as aforesaid, the said Louisville law and equity court having meantime denied an appeal prayed therein.

And they say that on the 4th day of August, 1891, the appellee and said John A. Williamson had caused an order of the Louisville law and equity court to be made in said proceeding
120 that these appellants respond further therein by the 25th day of September, 1891; and they say that on the said 25th day of September, 1891, they did respond further and therein set forth to the Louisville law and equity court the pendency of said last-named appeal and supersedeas and filed in said court a copy of said supersedeas and caused the same to be executed by delivering a copy to said John A. Williamson. Notwithstanding same, the appellee and said John A. Williamson did continue and do continue to prosecute said proceeding against these appellants, and on said day, after the execution of supersedeas as aforesaid and after the filing of said last-named response, the appellee and said John A. Williamson caused an order of the Louisville law and equity court to be made that these appellants respond further by the 20th day of October, 1891, and caused an attachment to be issued out of said court in said proceeding and are prosecuting the same to cause these appellants, other than The City of Newport, to be arrested and taken in arrest to Louisville, to appear before said court on the 20th day of October, 1891, there to be dealt with by said court for said alleged contempt and for failing to rescind as aforesaid; and they say that said appellee and John A. Williamson are prosecuting said proceeding, notwithstanding supersedeas as aforesaid, and they say that said proceeding is for an enforcement of a civil right claimed by appellee and for no other purpose.

And they further say that Hon. Sterling B. Toney is, and during all said proceedings was, judge of said Louisville law and
121 equity court and presiding therein, and that on said 25th

Dunnigan, J. H. Eggleston, Jas. E. McCracken, John Schnorr, and Benj. Keim, will take notice that on Monday, the 13th day of October, 1891, the appellee, The Newport Light Company, will move the court of appeals of Kentucky to dismiss the above-styled appeal upon the grounds—

First. That the order appealed from is not a final order.

Second. That no appeal can be taken to the court of appeals to reverse a judgment punishing contempt, and that the granting of the appeal by the clerk of said court is void.

THE NEWPORT LIGHT COMPANY,
By NELSON & DESHA, *Att'ys.*

The above notice is accepted by appellants this 2nd October, 1891.

CHAS. J. HELM,
Of Counsel for Appellants.

Afterwards, at a court of appeals held as aforesaid on October 17th, 1891, the following order was entered:

Order — File Affidavit, &c., & Mot. for Rule vs. Judge Lower Court.

Came appellant, by counsel, and filed an affidavit and
118 grounds and moved the court for a rule against the Honorable Sterling B. Toney to show cause why he should not be punished for contempt in proceeding under the judgment and order of the Louisville law and equity court while said judgment and order remains superseded and appeal therefrom pending in this court; and the case is submitted on said motion.

The affidavit referred to in the foregoing order is as follows:

Court of Appeals of Kentucky, September Term, 1891.

THE CITY OF NEWPORT & A. S. BERRY & Others, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee.

(*Motion and Affidavit.*)

The appellants respectfully show to this honorable court that before the 13th day of July, 1891, the appellee and one John A. Williamson, its president, filed in the Louisville law and equity court a certain information charging that these appellants were guilty of contempt of said court, in that they had contracted with a certain corporation, to wit, the Suburban Electric Illuminating, Heating and Power Company, to light the streets of the city of Newport by electricity, and in ordering a discontinuance of the use of gas of The Newport Light Company, appellee, for such illuminating after the 1st day of July, 1891; and thereupon the appellee and said John A. Williamson, its president, caused a certain rule to issue from the Louisville law and equity court against these appellants, requiring
them to show cause to said court why they should not be
119 punished for said alleged contempt and therein caused an order to be made by said court on the 13th day of July, 1891,

adjudging these appellants guilty of contempt as aforesaid and ordering them to rescind said contract with said illuminating company and to rescind said order of discontinuance of gas before the 24th day of July, 1891; to which judgment and order these appellants excepted; and thereafter, on the 17th day of July, 1891, these appellants prayed out of the clerk's office of this honorable court and obtained an appeal from said judgment and order and caused said judgment and order to be duly superseded; which said appeal is still pending and undetermined in this court; and they say that said supersedeas was then immediately executed by delivering a copy to the said John A. Williamson, president of appellee. Notwithstanding the same, the appellee and said John A. Williamson continued to prosecute said proceeding in the Louisville law and equity court against these appellants and therein caused the said court, on the 4th day of August, 1891, to adjudge insufficient the response of these appellants setting forth the pendency of said appeal and supersedeas; and thereafter, on the 18th day of September, 1891, the same being more than sixty days after the entry of said judgment and order that these appellants were in contempt and said order to rescind, these appellants again prayed an appeal and supersedeas as aforesaid, the said Louisville law and equity court having meantime denied an appeal prayed therein.

And they say that on the 4th day of August, 1891, the appellee and said John A. Williamson had caused an order of the Louisville law and equity court to be made in said proceeding
120 that these appellants respond further therein by the 25th day of September, 1891; and they say that on the said 25th day of September, 1891, they did respond further and therein set forth to the Louisville law and equity court the pendency of said last-named appeal and supersedeas and filed in said court a copy of said supersedeas and caused the same to be executed by delivering a copy to said John A. Williamson. Notwithstanding same, the appellee and said John A. Williamson did continue and do continue to prosecute said proceeding against these appellants, and on said day, after the execution of supersedeas as aforesaid and after the filing of said last-named response, the appellee and said John A. Williamson caused an order of the Louisville law and equity court to be made that these appellants respond further by the 20th day of October, 1891, and caused an attachment to be issued out of said court in said proceeding and are prosecuting the same to cause these appellants, other than The City of Newport, to be arrested and taken in arrest to Louisville, to appear before said court on the 20th day of October, 1891, there to be dealt with by said court for said alleged contempt and for failing to rescind as aforesaid; and they say that said appellee and John A. Williamson are prosecuting said proceeding, notwithstanding supersedeas as aforesaid, and they say that said proceeding is for an enforcement of a civil right claimed by appellee and for no other purpose.

And they further say that Hon. Sterling B. Toney is, and during all said proceedings was, judge of said Louisville law and
121 equity court and presiding therein, and that on said 25th

day of September, 1891, he refused to respect either of said orders of supersedeas, notwithstanding that the same were then and there presented and pleaded before him, but that he then and there ordered attachment to be issued to Campbell county to arrest said mayor and members of council and bring their bodies before him on the 20th day of October, 1891, to be by his court, he presiding therein, dealt with for said alleged contempt of his court.

And they say that afterward, on the 14th day of October, 1891, they moved said court—Hon. Sterling B. Toney, presiding—to set aside said orders of attachment on the ground that appellee and said John A. Williamson had, in their response of October 13th, 1891, to the rule against them herein alleged in substance that said court had *sua sponte* ordered said attachments, and appellee was present at the making of said motion and not objecting otherwise than by silence; yet the said Hon. Sterling B. Toney, presiding as aforesaid, overruled said motion and refused to set aside said order of attachments, and thereby again refused to respect said supersedeas or the jurisdiction of this honorable court and still persistently so refuses.

Wherefore they pray that a rule issue from this court against the Honorable Sterling B. Toney, returnable to such time as to the court may seem proper, requiring him to show cause, if any he can, why he should not be punished for contempt of this honorable court in so proceeding under said judgment and order of the Louis-
122 ville law and equity court while same remains superseded and appeal therefrom pending in this honorable court.

STATE OF KENTUCKY, }
Campbell County, } *sct:*

John G. Wall says he is one of the appellants above named, and the statements of fact contained in the foregoing motion are true.

JOHN G. WALL.

Subscribed and sworn to before me by said Jno. G. Wall this 15th day of October, 1891.

T. P. CAROTHERS,
Notary Public, Campbell County, Ky.

Afterwards, at a court of appeals held as aforesaid on October 22, 1891, the following orders were entered:

Order Filing Notice, &c., & Motion for Writs of Prohibition & Mandamus; Filing Copy of Proceedings — Lower C't Since Filing Copy of Supersedeas; Order — File Affidavit.

Came the appellants, by counsel, and filed a copy of record, notice, and grounds, and moved the court for a writ of prohibition or other appropriate writ or order commanding the Hon. Sterling B. Toney, judge of the Louisville law and equity court, to proceed no further upon the judgment and order of said court, an appeal from which is now pending in this court, and also moved the court for a man-

damus commanding said Toney to grant an appeal from the judgment of said court, rendered on the 20th day of October, 1891, prayed for by the appellants; to which motions the appellee, by counsel, objects, The appellee then filed an affidavit and moved the court to grant them time in which to respond to said
123 motion. The appellants then filed a response to the said motion, and the cause is submitted on all of said motions.

The notice filed by the foregoing order is as follows:

Notice.

Court of Appeals of Kentucky.

THE CITY OF NEWPORT & A. S. BERRY, Mayor, &c., Appellants,
vs.
THE NEWPORT LIGHT COMPANY, Defendant. } Notice.

The appellee will take notice that on Thursday, October 22, 1891, the appellants will move the court of appeals to issue to the Louisville law and equity court a writ of prohibition or other proper writ to compel said Louisville law and equity court to grant an appeal from its order of Oct. 20th, 1891, committing certain of the appellants to prison and commanding it that it cease proceeding in said matter until the determination of the appeals herein.

HALLAM & MYERS,
JOHN P. NEWMAN,
T. P. CAROTHERS,
Att'ys for Appellants.

The grounds and motion referred to are as follows:

Grounds of Motion.

Court of Appeals of Kentucky.

THE CITY OF NEWPORT, A. S. BERRY, WM. CASSIDY, &c., Appellants,
vs.
124 THE NEWPORT LIGHT COMPANY. } Motion.

The appellants, The City of Newport, A. S. Berry, Wm. Cassidy, and others, now come and file a certified copy of proceeding had in the Louisville law and equity court in this case since the filing in that court of the supersedeas which issued from this court, and now move this court to issue a writ of prohibition or other appropriate writ or order commanding the Hon. Sterling B. Toney, judge of the said Louisville law and equity court, to proceed no further in said case until the appeal pending in this court shall have been determined.

Appellants also move this court, should it find the judgment of July 13th, 1891, from which this appeal is pending, not to be a final judgment, that it will issue an order to the said Honl. Sterling B.

Toney commanding him to grant the appeal prayed of him by the appellants herein from the judgment of October 20th, 1891, found on page 19 of the Record herewith filed, and which, as therein appears, has been refused.

THOS. P. CAROTHERS,
HALLAM & MYERS.
JNO. P. NEWMAN &
C. J. HELM,
Attorneys for Appellants.

The copy of record referred to is in words and figures following, to wit:

Copy of Proceedings Had in Lower Court.

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs.
125 CITY OF NEWPORT,

and

DUEBER LIGHT CO.
vs.
NEWPORT LIGHT CO.

Pleas before the honorable judge of the Louisville law and equity court, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

Be it known that heretofore, to wit, at a court held for the court aforesaid on the 25th day of September, 1891—

DUEBER LIGHT CO.
vs. #1607.
NEWPORT LIGHT CO.

NEWPORT LIGHT CO.
vs. #1606.
CITY OF NEWPORT.

Came City of Newport, its mayor, and the members of the board of councilmen, by counsel, and filed a supplemental response and two exhibits and a supersedeas from clerk's office of court of appeals of Kentucky; to which Newport Light Co., by counsel, objected, and, said objection being overruled, it excepted.

And the court, being advised, adjudges said supplemental response insufficient; to which said respondents except.

And the rule herein against the following-named parties is now made absolute and an attachment is awarded against them, return-October 20th, 1891, to answer for a contempt offered this court in

disregarding its process and authority, viz., William Cassidy,
126 James McCracken, John Halloran, Edward Enneking, James Knobloch, B. W. Keim, Phillip J. Ryan, Jacob Smith, James Dunnigan, John G. Wall, J. H. Egelston, and A. S. Berry.

Said attachment to be endorsed by the clerk, "Bond in the sum of $200.00 may be taken."

Said supplemental response is in the words and figures as follows to wit:

(*Supplemental Response.*)

Louisville Law & Equity Court. In Equity.

THE NEWPORT LIGHT CO., Plaintiff,
vs.
THE CITY OF NEWPORT, Defendant.

And consol. case.

The City of Newport, its mayor, and the members of the board of councilmen, for further supplemental response to the rule against them herein, respectfully show to the court:

1. That they in good faith moved the Campbell chancery court at its September term, 1891, to dissolve the injunction issued out of the clerk's office of said court, as set forth in the first supplemental response herein, and on the 18th day of September, 1891, said court did dissolve said injunction, but the same was on the 22nd day of said month reinstated by an order of one of the honorable judges of the court of appeals of Kentucky without the knowledge or consent of these respondants, and said injunction remains in the same force and effect as at the last preceding hearing of this rule.

127 2. Respondants further say that on the 18th day of September, 1891, they prayed an appeal of the clerk of the court of appeals from the adjudication of this honorable court made upon this rule July 14th, 1891, and the same was by him duly granted and bond was at the same time duly executed before him to supersede said adjudication and was by him duly excepted and supersedeas duly issued accordingly and executed by delivering a copy to the relator in this rule and lodging a copy in the clerk's office of this honorable court for filing in this cause and remains in full force and effect, and said appeal is so pending and undetermined.

And they say that on the 13th day of this month they caused notice to be duly served on said relator that they would, on the 22nd day of this month, move the court of appeals to docket and advance said appeal, and, by counsel, were present in said court to make said motion, but said relator refrained to appear or manifest consent, and respondents could not, by the rules of said court, make any motion therein without such consent.

And they say that on the 23rd day of this month they attempted to serve on said relator a written request to consent to such docketing and advance, coupled with an offer to appear at any time to

any motion said relator might make to dismiss said appeal, but that the absence of relator's president and attorneys from Campbell county prevented it.

Respondents file herewith, as part hereof, both of said writings, with the returns on the former, and show to this honorable court that they are ready and willing and desirous to have the court
128 of appeals promptly dispose of said appeal, and hereby tender and offer to appear in said court at any time to any motion the said relator may make and in any and every way to contribute to an immediate determination of any and every question relating to said appeal in order that they may not remain in even the appearance of contempt of this honorable court.

They therefore pray that this cause be retained by this honorable court without further proceeding until such time as, by or without the co-operation or facilitation, active or passive, of the relator in this rule, the court of appeals may at least dispose of the question whether the order of this honorable court is duly superseded.

HALLAM & MYERS,
T. P. NEWMAN,
THOS. P. CAROTHERS, &
C. J. HELM,
Att'ys for Respondents.

Said exhibits are in the words and figures as follows, to wit:

NEWPORT, KY., *Sept. 23rd*, 1891.

To the president and directors of the Newport Light Company.

GENTLEMEN: On the 18th day of September, 1891, the clerk of the court of appeals granted us an appeal from the judgment of the Louisville law and equity court rendered July 13th, 1891, in the cases of The Newport Light Company *vs.* City of Newport and The Dueber Light Company *vs.* The Newport Light Company.
129 You were served with notice on the 19th day of September, 1891, of a motion to be made — the court of appeals to docket and advance said case on the 22nd day of September, 1891. On that day we appeared in the court of appeals, but did not make the motion because of a rule of the court not to docket a cause except by consent of both parties. You were not represented, and we could not ask that consent then. We now ask your consent to docket that appeal, and we offer to accept notice of any motion you may choose to make in the court of appeals at any time by which that court can pass on the question whether we have a right to appeal from the judgment of the Louisville law and equity — above mentioned.

We suggest that these motions be made to-morrow in the court of appeals. Our attorney, Mr. Helm, will await your answer until six

o'clock this evening at his office to arrange for any motion to-morrow, and all day to-morrow, if you choose another time.

Respectfully,

CITY OF NEWPORT,
A. S. BERRY, AND
THE MEMBERS OF THE BOARD
OF COUNCILMEN,
By THOS. P. CAROTHERS &
C. J. HELM, *Their Attorneys.*

Court of Appeals of Kentucky.

THE CITY OF NEWPORT, A. S. BERRY, *et als.*, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee. } Notice.

The appellee is hereby notified that the appellants will, on Tuesday, September 22nd, 1891, move the court to docket this
130 appeal and advance it for hearing.

HALLAM & MYERS,
NEWMAN & HELM,
Attorneys for Appellants.

*E*xecuted the within notice this 19th day of September, 1891, on the Newport Light Co. by delivering to John A. Williamson, its president and chief officer found in my county, a copy thereof.

LOUIS BETZ, *Sheriff*,
By LOUIS C. BETZ, *D. S.*

And the said supersedeas is in words and figures as follows, to wit:

STATE OF KENTUCKY,
CLERK'S OFFICE OF THE COURT OF APPEALS.

As clerk of the court of appeals of the State aforesaid I certify that an appeal has been granted according to law from a judgment obtained by Newport Light Company against City of Newport, &c., sustaining demurrer to response and adjudging response insufficient, and that the acts of appellants were a violation of the injunction and ordering a re-cis-ion of the contract, and ordering the city counsel to set aside resolution passed on April 23rd, 1891, and to continue to take gas from the appellee, in the Louisville law and equity court on July 13th, 1891, in a certain petition, and that a supersedeas bond has been executed.

Wherefore the appellee and all others are hereby commanded to stay proceedings on said judgment.

Witness A. A. Adams, clerk of the court of appeals, this
131 18th day of September, 1891.

A. ADDAMS, *C. C. A.*

On the same day, to wit, the 25th day of September, 1891, there issued from the office of the clerk of said court an attachment in accordance with the order therefor in words and figures as follows, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

To the sheriff of Campbell county, Greeting:

We command you to attach William Cassidy, James McCracken, John Holloran, Edward Emerking, James Knoblock, B. W. Keim, Philip J. Ryan, Jacob Smith, James Dunnigan, John G. Wall, J. H. Egelston, and A. S. Berry, if they be found, and them safely keep, so that you have their bodies before the judge of the Louisville law and equity court, at the court-house, in the city of Louisville, on the 20th day of October, 1891, at 10 o'clock a. m., to answer for a contempt offered this court by disregarding its process and authority in the case of Newport Light Company *vs.* City of Newport and Dueber Light Company *vs.* Newport Light Company, and this they shall in nowise omit, and have then and there this writ.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, this 25th day of September, 1891.

JNO. H. WELLER, *Clerk.*
By JOHN M. O'NEILL, *D. C.*

(Endorsed:) Bond in the sum of two hundred dollars may
132 be taken. Attest: J. H. Weller, c'k, by J. M. O'Neill, D. C.

Executed the within order of attachment this 29th day of September, 1891, on A. S. Berry by arresting him, and released him upon his executing bond—see said bond returned herewith—and executed further this 19th day of October, 1891, on William Cassidy, James McCracken, John Halloran, Edward Emerking, James Knoblock, B. W. Keim, Philip J. Ryan, Jacob Smith, James Dunnigan, and John G. Wall by arresting them, and released them upon their executing bond; see said bond returned herewith. Homer Eggleston not found in my county.

October 19th, 1891.

LOUIS BETZ, *Sheriff.*

The said bonds returned by the sheriff are in words and figures as follows, to wit:

We acknowledge ourselves bound to the Commonwealth of Kentucky in the sum of two hundred dollars as bail for the appearance of A. S. Berry at the time and place mentioned in the attachment to which this bond is affixed.

September 29th, 1891.

A. S. BERRY.
HENRY L. HOWES.

Attest: LOUIS BETZ, *Sh'ff.*
By LOUIS C. BETZ, *D. S.*

We acknowledge ourselves bound to the Commonwealth of Kentucky in the sum of two hundred dollars each as bail for the appearance of Wm. Cassidy, James McCracken, John Holloran, Edward

Emerking, James Knoblock, B. W. Keim, Philip J. Ryan, Jacob Smith, James Dunnigan, and John G. Wall at the time and
133 place named in the attachment to which this bond is attached.

October 19th, 1891.

A. S. BERRY,
J. McCRACKEN,
EDWARD ENNEKING,
JOHN C. WALL.

Attest: LOUIS BETZ, *Sheriff*.
By LOUIS C. BETZ, *D. S.*

At a court held for the court aforesaid on the 14th day of October, 1891—

NEWPORT LIGHT COMPANY, Plaintiff, }
vs. } = 1606.
CITY OF NEWPORT, Defendant. }

Came City of Newport and the mayor and members of the board of councilmen thereof, by counsel, and filed a notice and exhibit marked "A X" and moved the court to set aside so much of the order of September 25th, 1891, as ordered an attachment to be issued against them, and moved the court to discharge the rule against them and filed grounds in support of said motions.

And said motions are now overruled; to which said mayor and members of the board of councilmen, by counsel, except.

The said notice is in words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Pl'ff, }
vs. } Notice.
134 CITY OF NEWPORT, Def't. }

The plaintiff is hereby notified that the defendant and A. S. Berry and the members of the board of councilmen of the said city of Newport will on Wednesday, Oct. 14th, 1891, move the court to set aside the order of September 25th, 1891, awarding attachments against the said A. S. Berry and the individual members of the board of councilmen of the city of Newport and to dismiss the rule.

THOS. P. CAROTHERS,
HALLAM & MYERS &
C. J. HELM,
Att'ys for Defendants.

Executed the within notice on the Newport Light Company this 13th day of October, 1891, by delivering a true copy thereof to John A. Williamson, the president of the Newport Light Company.

J. C. NOEL, *Sh'f*.
By A. T. KIRTLEY, *D. S.*

The paper marked "A X" and filed with the said motion is in words and figures as follows, to wit:

COMMONWEALTH OF KENTUCKY:

Court of Appeals.

At a court of appeals held in and for the State of Kentucky on the 29th day of September, 1891, the following order was made:

CITY OF NEWPORT, &c., Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee.
} Appeal from Louisville Law and Equity Court.

135 Came the appellants, by counsel, and filed an affidavit, notice, and grounds, and moved the court for a rule against the appellee and John A. Williamson requiring them to show cause why they should not be punished for contempt of this court in disregarding the supersedeas issued herein, and the cause is submitted on said motion.

The following is the motion and affidavit filed by the foregoing order:

Court of Appeals of Kentucky, September Term, 1891..

THE CITY OF NEWPORT and A. S. BERRY and Others, Appellants,
vs.
NEWPORT LIGHT COMPANY, Appellee.
} Motion and Affidavit.

The appellants respectfully show to this honorable court that before the 13th day of July, 1891, the appellee and one John A. Williamson, its president, filed in the Louisville law and equity court a certain information charging that these appellants were guilty of contempt of said court in that they had contracted with a certain corporation, to wit, the Suburban Electric Illuminating and Power Company, to light the streets of the city of Newport by electricity, and in ordering a discontinuance of the use of gas of The Newport Light Company, appellee, for such illuminating after the first day of July, 1891; and thereupon the appellee and said John A. Williamson, its president, caused a certain rule to issue from the Louisville law and equity court against these
136 appellants, requiring them to show cause to said court why they should not be punished for said alleged contempt, and therein caused and ordered to be made by said court on the 13th day of July, 1891, adjudging these appellants guilty of contempt as aforesaid and ordering them to rescind said alleged contract with said illuminating company, and to rescind said order of discontinuance of gas before the 24th day of July, 1891, to which judgment and order these appellants excepted, and thereafter, on the 17th day of July, 1891, these appellants prayed out of the clerk's office of this honorable court and obtained an appeal from said judgment

and order, and caused said order and judgment to be duly superseded, which said appeal is still pending and undetermined in this court; and they say that said supersedeas was then immediately executed by delivering a copy to the said John A. Williamson, president of appellee. Notwithstanding the same the appellee and said John A. Williamson continued to prosecute said proceeding in the Louisville law and equity court against these appellants, and therein caused the said court, on the 4th day of August, 1891, to adjudg- insufficient the response of these appellants setting forth the pendency of said appeal and supersedeas, and thereafter, on the 18th day of September, 1891, the same being more than sixty days after the entry of said judgment and order that these appellants were in contempt and said order to rescind, these appellants again prayed an appeal and supersedeas as aforesaid, the said Louisville law and equity court having meantime denied an appeal prayed therein.

And they say that on the 4th day of August, 1891, the appellee and said John A. Williamson has caused an order of the
137 Louisville law and equity court to be made in said proceeding that these appellants respond further therein by the 25th day of September, 1891, and they say that on the said 25th day of September, 1891, they did respond further and therein set forth to the Louisville law and equity court the pendency of said last-named appeal and supersedeas, and filed in said court a copy of said supersedeas and caused the same to be executed by delivering a copy to said John A. Williamson. Notwithstanding same the appellee and said John A. Williamson did continue and do continue to prosecute said proceeding against these appellants, and on said day after the execution of supersedeas as aforesaid and after the filing of the said last-named response the appellee and said John A. Williamson caused an order of the Louisville law and equity court to be made that these appellants respond further by the 20th day of October, 1891, and caused an attachment to be issued out of said court in said proceeding, and are prosecuting the same to cause these appellants, other than The City of Newport, to be arrested and taken in arrest to Louisville, to appear before said court on the 20th day of October, 1891, there to be dealt with by said court for said alleged contempt and for failing to rescind as aforesaid, and they say that appellee and said John A. Williamson are prosecuting said proceeding, notwithstanding supersedeas as aforesaid, and they say that said proceeding is for an *en*forcement of a civil right claimed by appellee, and for no other purpose.

Wherefore they pray that a rule issue from this court against the appellee and said John A. Williamson, returnable to such time as
138 to the court may seem proper, requiring them and each of them to show cause, if any they can, why they should not be punished for contempt of this honorable court in so proceeding under said judgment and order of the Louisville law and equity court while same remains superseded and appeal therefrom pending in this honorable court.

STATE OF KENTUCKY, }
Campbell County, } *sct:*

A. S. Berry says he is one of the appellants above named and the statements of fact contained in the foregoing motion are true.

A. S. BERRY.

Subscribed and sworn to by A. S. Berry before me this 26th day of September, 1891.

HOWARD BALL,
Examiner C. C., K.

Afterward, on the 1st day of October, 1891, in the court of appeals, the following orders were entered in said case:

The court being sufficiently advised, it is considered the the motion for a rule herein be sustained and a rule is awarded against the appellee and John A. Williamson requiring them to show cause, if any they have or can, why they should not be punished for contempt of this court in disobeying the supersedeas issued herein.

Came then the appellee and John A. Williamson, by counsel, and entered their appearance to the said rule, and on their motion they are given until Monday, the 12th day of October, 1891, to respond to the said rule.

139 And on October 13th, 1891, in the court and case aforesaid, the following orders were entered, to wit:

Came the appellant, by counsel, and moved the court to make the rule herein absolute.

Came then the appellee and John A. Williamson, by counsel, and filed a response to the rule, and also filed a notice and grounds and moved the court to dismiss the appeal herein; to which motion the appellants object, and the cause is submitted on the response and the said motion.

The following is the response to the rule filed by the foregoing order:

Court of Appeals of Kentucky.

CITY OF NEWPORT *et als.*, Appellants, }
vs. } Response to Rule.
NEWPORT LIGHT CO., Appellee. }

The Newport Light Company and John A. Williamson, for response to the rule herein, say that on the 18th day of July, 1885, in Louisville law and equity court, in an action therein pending between the Newport Light Co. and the City of Newport, — rendered a judgment perpetually enjoining and restraining the city of Newport and its officers and agents from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the city of Newport with gas or otherwise during the existence of the contract between the city of Newport and the Newport Light Co. and from discontinuing the taking of gas from the Newport

Light Co. for the lighting of said places, in such quantities as
140 may be required for that purpose, according to contract between the said parties as long as said contract shall remain in force. Said contract by its terms is to remain in full force until June 1st, 1907. From the said judgment the city of Newport prayed an appeal to this court; and afterwards, on the — day of ——, 188—, the same was affirmed. A transcript of the record of said cause is on file in this court and is hereby referred to and made part hereof. Respondents say that The City of Newport and all other appellants herein have failed and refused and still fail and refuse to obey the said judgment, and that on the 13th day of July, 1891, the Louisville law and equity court made an interlocutory order requiring them to set aside and annul the contract made with the Suburban Electric Illuminating and Heating and Power Co., which contract was made in violation of said injunction to cease to light or have lighted the streets, lanes, alleys, public buildings or places of the city of Newport under said contract and to rescind and set aside, on or before the 24th day of July, 1891, the resolution passed on the 23rd day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company, and the respondents say that no other or final judgment or order has yet been made by said court in the said proceedings.

Respondents say that on the 25th day of September, 1891, the attorney of the Newport Light Company, being present in the Louisville law and equity court when the appellants offered to file a supplemental response and a copy of the supersedeas, objected
141 to the filing of the same, but the court overruled the objection and allowed the supplemental response to be filed; and thereupon the said court, without any other motion upon the part of the Newport Light —, but of its own motion, ordered an attachment to be issued against the appellants.

A certified copy of said proceedings is filed herewith as part hereof. The respondent, John A. Williamson, was not present when said order was made and had no knowledge of the same for ten days thereafter.

JOHN A. WILLIAMSON.

John A. Williamson says he is president of the Newport Light Co., and that the statements contained in the foregoing response are true.

JOHN A. WILLIAMSON.

Sworn to before me by John A. Williamson this 13th day of October, 1891.

ROBT L. GREENE,
D. C. C. A.

COMMONWEALTH OF KENTUCKY, }
Court of Appeals. }

I, A. Addams, certify that the foregoing 7 pages contain a complete transcript of the proceedings had in case of City of Newport, &c., *vs.* Newport Light Co., in said court, in reference to rule against

appellees, from and including September 29th, 1891, to and including the 13th of October, 1891, except the notice of the motion for the rule.

Given under my hand this 12th day of October, 1891.

A. ADDAMS, *C. C. A.*,
By ROBT L. GREENE, *D. C.*

142 The said written motion and grounds filed in court by said order of the 14th October, 1891, *is* in words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT COMPANY, Plaintiff,)
vs. Motion.
CITY OF NEWPORT, Defendants.)

And consolidated case.

The City of Newport and the mayor and members of the board of councilmen thereof move to set aside the order of September 25th, 1891, as to so much thereof as ordered that attachments issue against said mayor and members and upon the ground that in a certain proceeding now and on October 13th, 1891, pending in the court of appeals against the Newport Light Company and John A. Williamson for contempt of said court in prosecuting in this court the rule herein since and notwithstanding the supersedeas the said Newport Light Company and Williamson, by response under oath of said Williamson, its vice-president, did on said October 13th disclaim that they were prosecuting said rule on September 25th, 1891, or at any time since supersedeas issued, and alleged and still allege that said attachments were ordered by this honorable court gratuitously and without their motion, request, suggestion, participation, or countenance.

Said mayor and members further move the court to discharge the rule issued by it on the ground that by said disclaimer and repudiation said light company and Williamson have avowed and still avow that they have ceased to prosecute the same. A certified
143 copy of the record of all said proceedings in the court of appeals is herewith filed as part hereof.

HALLAM & MYERS,
C. J. HELM,
Att'ys for said Mayor & Councilmen.

And at a court held for the said Louisville law and equity court on the 20th day of October, 1891—

Came the City of Newport, its mayor, and the members of the board of councilmen of said city, by counsel, and tenders and moves the court for leave to file a supplemental response herein; to which Newport Light Co. objects.

The respondents, The City of Newport, A. S. Berry, mayor of said city; Wm. Cassidy, James McCracken, John Halloran, Edward Ennecking, James Knoblock, B. W. Keim, Phillip J. Ryan, Jacob

Smith, James Dunnigan, and John C. Wall, members of board of councilmen of said city of Newport, having failed and refused and still failing and refusing to comply with the order made herein on the 13th day of July, 1891, it is now ordered that all the respondents except the City of Newport be, and they are hereby, committed to the custody of the jailer of Jefferson county, to be by him confined in the jail of said county for the period of three months unless they shall before the expiration of that time comply with the said order of July 13th, 1891. It is adjudged that the Newport Light Company recover of the said defendants its costs herein expended, and therefor it may have execution.

And this proceeding is continued for such further orders as
144 may be necessary; to all of which respondents and each of
— except and pray an appeal to the court of appeals, which is refused by the court.

Ordered by the court that the execution of foregoing order be suspended until the 24th inst.

The said supplemental response is in words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO.)
vs.) Supplemental Response.
THE CITY OF NEWPORT.)

And consolidated case.

The City of Newport, its mayor, and the members of the board of councilmen of said city, for supplemental response to the rule and attachment against them herein, respectfully show to the court—

That the court of appeals has taken jurisdiction of the appeal granted by the clerk of that court on the 18th day of September, 1891, and from the order of this court of July 13th, 1891, set forth in the supplemental response of September 25th, 1891, in that it has issued a rule against John A. Williamson, president of the Newport Light Company, and the Newport Light Company to show cause why they should not be punished for contempt in disobeying the supersedeas issued from the office of the clerk of that court September 18th, 1891, in causing the attachment which issued from this court September 25th, 1891, to issue, and they say that said John A. Williamson and said Newport Light Company have responded to said rule; that said supersedeas is void and said matter now stands submitted in said court.

145 They also say that the said Newport Light Co. has moved the court of appeals to dismiss said appeal, and said motion now stands submitted.

That a decision upon said rule and said motion is confidently expected to-day or, at the latest, on next Thursday.

That these respondents respectfully and earnestly pray this court to postpone further action in the matter until said decision by the court of appeals, faithfully pledging themselves that after said de-

cision by said court of appeals they will fully and immediately obey the order of this court if so directed by this court. They further say that they have no personal interest in the matters at issue, but are but the representatives of the people of the city of Newport, and only desire to faithfully discharge their duty as such, and they disclaim all intention of disrespect to this court, its orders or process.

HALLAM & MYERS,
THOS. P. CAROTHERS,
C. J. HELM,
Atty's for Respondents.

James E. McCracken says that he is one of the respondents, and that the statements of the foregoing supplemental response are true.

J. McCRACKEN.

Subscribed and sworn to before me by James McCracken this 20th day of October, 1891.

JNO. M. O'NEILL,
D. C. Louis. Ch'y Court.

146 COMMONWEALTH OF KENTUCKY, }
Louisville Law and Equity Court, } *sct:*

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, certify that the within and foregoing 21 pages contain a full, true, and complete transcript of the record and proceedings had in said Louisville law and equity court in the consolidated cases of Newport Light Co. *vs.* City of Newport and Dueber Light Company *vs.* Newport Light Company, now pending in said court, from and including the 25th day of September, 1891, down to the present time, all of which appears of record in my office.

Witness my hand this 20th day of October, 1891.

JNO. H. WELLER, *Clerk,*
By ALEX. A. LUCAS, *D. C.*

The affidavit filed by appellee is as follows:

Affidavit for Time.

Court of Appeals of Kentucky.

THE CITY OF NEWPORT, &c., Appellants,
vs.
THE NEWPORT LIGHT CO., Appellees. } Affidavit.

John A. Williamson says that he is the president of the appellee, The Newport Light Co., and that the notice herein was served on him as president of appellee as aforesaid on Wednesday, the 21st inst., at the hour of four (4) o'clock p. m.; that immediately
147 upon receipt of said notice, knowing that one of the counsel of the Newport Light Co. was without the city of Newport,

he proceeded immediately to the residence of another of said counsel, Hon. John G. Carlisle, in the city of Covington, and found him with his trunk packed and just ready to start to the city of Washington on important public business, and that it would be impossible for him to be in Frankfort before the middle of the coming week. He says that he then proceeded to the residence of his other counsel, Mr. Nelson, and found him, having just returned from the city of Cin'ti, Ohio, which was then half past five o'clock. He says that neither he nor the Co. which he represents nor the counsel of said Co. have had any reasonable or, in fact, any opportunity to prepare for the motion mentioned in said notice. He therefore asks that this matter be postponed until some convenient day next week, when he and his counsel may be present to respond to said motion. John A. Williamson says the statements made in the foregoing affidavit are true, as he verily believes.

JOHN A. WILLIAMSON.

Subscribed and sworn to before me by John A. Williamson this October 21, 1891.

HENRY E. YOUTSEY,
Notary Public in & for Campbell County, Kentucky.

The response of appellants filed by the foregoing order is as follows:

Response to Appellee's Motion for Time.

148 Court of Appeals of Kentucky.

CITY OF NEWPORT, &c., Appellants,
vs.
THE NEWPORT LIGHT CO., Appellee. } Response to Motion to Postpone.

The appellants say that the motion for postponement should not be considered unless accompanied with an agreement to suspend the execution of the order of commitment. Again the identical question here involved has been briefed by Mr. Carlisle, of counsel for appellee.

CHAS. J. HELM,
Of Counsel for Appellants.

Afterwards, at a court of appeals held as aforesaid, on October 24, 1891, the following orders were entered:

Order Overruling Motion to Dismiss; Noting Opinion; Order Advancing Case for Hearing.

The court being sufficiently advised, it is considered that the motion to dismiss the appeal herein be overruled, opinion delivered, and as to the other motions herein the court, to be advised, took time.

It is ordered that this cause be advanced and set for hearing on next Friday, October 30th, 1891.

The opinion delivered is in words and figures following, to wit:

In July, 1885, the appellee, The Newport Light Company, obtained a judgment in the Louisville law and equity court against the appellant, The City of Newport, perpetually enjoining it from making any contract with any party for the lighting of
149 its streets by gas or otherwise during the continuance of the then existing contract between them for that purpose and from ceasing to take gas as per the contract from the appellee.

The judgment was affirmed by this court.

In July, 1891, the appellee, through its president, obtained, upon affidavit, a rule against the mayor and councilmen of the city to show cause for contempt by disobeying the injunction.

July 13, 1891, their response was held insufficient and they adjudged to be in contempt.

They were given until a certain day to purge themselves of the contempt by annulling a contract the city had made with another company for lighting its streets, &c., and by ceasing to use such light. They were also ordered to rescind a resolution of the council discontinuing the light furnished by the appellee and to continue to take gas from it.

Four days after this judgment was rendered the appellants sued out an appeal from this court and superseded the judgment.

Thereafter, and for the reason, doubtless, that under our code an appeal can only be granted during the term at which it is rendered by the court rendering it, and which term in the Louisville law and equity court expires sixty days from judgment, the appellants asked that court to grant them an appeal.

It was refused, and after the expiration of the term they sued out another appeal from this court and again superseded the judgment.

150 What had thus been done was made known to the lower court by a supplemental response, but it made the rule for contempt absolute and awarded an attachment against the appellants, and the record before us shows that since then the court has entered a judgment committing the mayor and councilmen to jail for three months, unless they sooner comply with the judgment of July 13, 1891, the execution of it being suspended, however, until a certain day.

An appeal was also refused by the lower court from this last order.

The appellants are now asking that a rule, which they obtained from this court without the respective parties being then heard, against the appellees for alleged contempt in disobeying the supersedeas upon the appeal by continuing to prosecute the contempt proceeding in the lower court be made absolute.

They are also asking a rule for contempt against the judge of the lower court for proceeding, as is claimed, in violation of the supersedeas of this court; also a writ of prohibition to restrain further action upon his part, and in the event this court is of the opinion the judgment of July 13, 1891, is not of such a final character as to

authorize an appeal from it, that then the judge of the lower court be ordered by this court to grant an appeal from the order committing the appellants to jail.

Upon the other hand, the appellees are moving to dismiss the appeal, and whether this should be done is the only question we shall now determine, as doubtless the lower court will
151 be governed in the future by the ruling of this court upon that question, thus rendering it unnecessary to consider the other motions.

It is urged that the appeal should be dismissed, first, upon the ground that the judgment of July 13, 1891, was not a final one; and, second, that it was merely one for contempt, and therefore no appeal lies from it.

The power of contempt is exercised for two purposes—first, to vindicate the dignity of the court for disrespect shown to it or its orders; and, second, to compel the performance of some order or decree which the recusant party is able to but which he refuses to perform.

This power is necessarily inherent in the court, is vital to its existence, and is not generally subject to revision by a higher court. Without it courts would be impotent and contemptible, and if its exercise were subject to the discretion of a superior it would, to a great degree, be useless.

Contempts are, however, of two classes—those which are in *facie curiæ* or direct, and those which are constructive or consequential; or, as said by some writers, civil and criminal.

It is said in Rapalje on Contempts, section 21: "Civil contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceedings before the court, while criminal contempt- are all those acts in disrespect of the court or, of its process or which obstruct the administration of
152 justice or tend to bring the court into disrespect."

A civil contempt must usually be brought to the notice of the court by affidavit, as was done in this case, and is rather to be looked upon as a civil proceeding for the benefit of the other party, although in name a contempt of court.

The proceeding in this instance is of this character, and the action of the lower court in refusing an appeal and disregarding the one taken is doubtless due to a belief that its action affects the party only as to a contempt.

This view is incorrect.

In the case of Bickley *v.* Commonwealth, 2 J. J. Marshall, 574, which was a criminal contempt, it was held that while this court ought not to retry a question of contempt or no contempt, yet it had power to correct and revise an illegal sentence or judgment pronounced against such an offense; and in Turner *vs.* Commonwealth, 2 Met., 619, this doctrine was reaffirmed, although the latter case was decided since the enactment of our statute, providing that no appeal shall be taken to this court from a judgment punishing a contempt.

This case does not, however, require us to go so far as to consider that question, and we by no means must be understood as holding that this court may take the place of the lower court in every case of contempt for every purpose.

Here, however, the parties appeared and filed their response. It was held insufficient upon demurrer, and its statements are therefore to be taken as true. They contended that what they had done did not violate the injunction. They relied upon an alleged
153 changed status of the parties; upon an alleged modification of the contract between the city and the appellee, and certain acts of the legislature.

The court, by the judgment of July 13, 1891, adjudged against all these matters and held the parties to be in contempt.

They were even required, by way of purging themselves of the contempt, to annul a contract the city had made with another party, which, perhaps, is impossible.

It fixed the rights of the parties. It determined that the defenses relied upon by them were not valid. It was more than a mere step toward the enforcement of the judgment of 1885. It did not, as urged by the distinguished counsel for the appellee, merely restore the status of the parties as it existed before the alleged violation of the injunction. It did more than this; it passed upon certain alleged rights of the city claimed to have arisen since the judgment of 1885 was rendered, and to this extent it certainly finally determined the rights of the parties.

It is as if the receiver of a court having been ordered to pay over money to a party, which he, at least, one time had in his hands, responds that he has already paid it to the party. The court, upon hearing, determines that he has not, and the receiver, declining to comply with the order of the court, when he could do so if he would, is adjudged in contempt.

Certainly it will not be claimed that he could not appeal from the judgment.

We do not now determine whether the response in this case was sufficient or not; that is a question upon which the par-
154 ties should be heard in this court, and all that is now determined is that the appellants had the right to appeal from the judgment of July 13, 1891, and that they are entitled to be heard in this court upon the questions involved in the appeal.

The motion to dismiss it is, therefore, overruled. The other motions are held under advisement.

Afterwards, on October 30th, 1891, the following orders were entered herein:

Discharging Rule vs. Appellee, &c.

Came the parties, by counsel, and on motion of the appellants it is ordered that the rule herein against the appellee and Jno. A. Williamson be dismissed at the cost of appellee and Jno. A. Williamson. It is therefore considered that the appellants recover of the appellee and Jno. A. Williamson their cost about said rule expended.

On the further motion of the appellants, it is ordered that the motion for a rule and also for a writ of prohibition against Sterling B. Toney, judge of the Louisville law and equity court, heretofore entered herein, be dismissed at the cost of the appellants.

It is therefore considered that said Sterling B. Toney recover of the appellants his cost about said motion expended.

And the cause coming on to be heard was argued by R. W. Nelson, for appellee, and Charles J. Helm, for appellants, and laid over for further hearing.

155 Afterwards, on October 31, 1891—

This cause again coming on to be heard was argued by Jno. G. Carlisle, for appellee, and T. F. Hallam, for appellant, and submitted.

Afterwards, at a term of said court of appeals held as aforesaid on the 4th day of March, A. D. 1893, the following judgments and orders were entered:

Judgment.

CITY OF NEWPORT, &c., Appellants, vs. NEWPORT LIGHT CO., Appellee. } Appeal from Louisville Law and Equity Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded with directions to discharge the rule herein, which is ordered to be certified to said court.

It is further considered that appellants recover of appellee their cost expended herein.

At the same time the court, through Judge Pryor, delivered the following opinion herein:

Opinion.

In the year 1885 a contract was entered into between the city of Newport and the Dueber Light Company, by which the latter was to furnish gas for lighting the city, &c., for a fixed period.

The city in the month of June of the year 1880 had made a contract with the Newport Light Company to furnish the same light to the city, and at the time of the execution of the con-
156 tract between the city and the Dueber Light Company the Newport Light Company was in the actual performance of its contract. The latter obtained an injunction preventing the Dueber Light Co. and the city from disturbing the exercise of its franchise under the contract of June, 1880, and the chancellor below rendered a judgment the substance of which was enjoining the city from making a contract with any person for lighting the streets, alleys, public buildings, etc., of the city with gas or otherwise during the continuance of the contract with the Newport Light Company.

The contract with the Newport Light Company continues until the year 1904. The case was brought to this court and the judgment affirmed.

In July, 1891, the city of Newport entered into a contract with a company called the Suburban Electric Company, by which that company undertook to furnish electric lights for the streets, etc., of the city, and the Newport Light Company, conceiving that the judgment of the chancellor in the equity action against the city and affirmed by the court was being disregarded, obtained a rule against the mayor, the councilmen, and others to show cause why they should not be punished for contempt for violating or refusing to obey the mandate of the chancellor. The motion on the rule was tried in the Louisville law and equity court and the parties adjudged to be in contempt and ordered to jail on their refusal to annul the contract between the city and the electric light company; and the question therefore arises, Can the city make any contract for lighting its streets and public places with electricity as long as the contract for furnishing it with gas remains in force?

157 It was held in the case brought to this court that the chancellor had the right to protect the Newport Light Company in the exercise of its franchise, and having expended large sums of money, with its pipes and posts laid down and erected, the city was properly enjoined from permitting the Dueber Light Company and the city from executing a like contract.

That a contract with a corporation when the right to contract existed was as inviolable as a contract made with natural persons. We think the case presented now is different in many aspects from the original case between the Dueber Light Company and the city, on the one side, and the Newport Light Company, on the other. By an act approved April 17th, 1890, the board of councilmen was authorized to contract for lighting the city of Newport and its inhabitants in any mode now known or which may hereafter be discovered, etc., and while no legislative enactment can authorize the violation of a contract, nor does this enactment propose to do so, as it provides that existing contracts shall not be interfered with, still the growth of the city and its increase of population since the contract of June, 1880, demands that its people and the public places shall have the benefit of the improvements made in lighting large cities, and under such a state of facts the chancellor would hesitate in inflicting the punishment for contempt or even in granting an injunction when the circumstances connected with the subject-matter of the contract have been changed and the city by reason of its rapid growth and the necessities of the public require that the more recent improvements in lighting the public places should be

158 adopted for the comfort and welfare of its people; otherwise the city would be compelled to use gas and no other light until the appellee's contract expires, which is in the year 1904.

The city, under the contract with the Newport Light Company, could not compel that company to furnish any other light than gas, and this court, in construing that contract in the case of The City of Newport *vs.* The Newport Light Company, reported in 89th Ky., held

that the Newport Light Company could not enter on the streets of Newport and subject them to a new use so as to furnish electric lights without the consent of the city, indicating clearly that as to improved lights the city had to be consulted before the Newport Light Company could use the streets for the purpose of furnishing it, and therefore the chancellor will not say that because of the original contract made in June, 1880, the city is to be deprived of electric lights unless the appellee sees proper to furnish them. Did that contract by its terms give to the Newport Light Company the unlimited power over its streets for the purpose of lighting them for the period of twenty-five years from June, 1880? We think not. The original action in this court under which the injunction was made perpetual was in reference to the supply of gas alone, and only considered in that light, and the word otherwise used in the restraining order by the judgment below cannot be construed as giving to the Newport Light Company the absolute right to furnish gas and any other light during the existence of the contract.

The contract may authorize the company to furnish gas or any other light as good, still it may decline to furnish
159 other lights or the city to receive them, as it is apparent the contract had reference to gas only, and could have been considered in no other way by either the court below or this court. The contention was as to which of the two companies should furnish gas, the Dueber Light Company or the appellee, and upon that issue the opinion of this court was rendered as found reported in 84th Ky. Now, the court of equity is asked to adjudge that no other light shall be used than gas, or, if so, that the Newport Light Company shall furnish it. The chancellor in restraining the city from making a contract with the Dueber Light Company went as far in protecting the rights of the appellee as was justified by the facts, but to go further and adjudge that no other company shall furnish light of a different character when in the judgment of the council the public interests require it would be to give the exclusive privilege to the appellee to furnish all lights necessary for the twenty-five years. The company has its legal remedy, and must resort to that remedy if it has sustained damages by reason of the refusal by the city to have its streets and public places lighted by gas. It is a right for the violation of which there is a remedy, but not to be enforced by the chancellor to the detriment of the public interests. We are not to be understood as holding that the appellee cannot retain its pipes in the streets with a view of furnishing gas to the inhabitants, but what we do hold is that a court of equity will not interfere to prevent the city from lighting the streets and public places with electric lights, and therefore the rule
160 against the appellants should be discharged.

There is a litigation pending in the court below by which the appellee is insisting that the city consented under the terms of the original contract that the appellee might place electric lights on the streets, etc.

This opinion is not to affect the pending litigation, as the questions involved in that case are not before us.

Reversed and remanded, with directions to discharge the rule.

Afterwards, at a court of appeals held as aforesaid on the 28th of March, 1893, the following order was entered:

Extending Time to File Petition for Rehearing.

On motion of the appellee, the time for filing a petition for rehearing herein is extended 20 days.

Afterwards, at a court of appeals held as aforesaid on May 2, 1893, the following order was entered herein:

Order Filing Petition.

The appellee, by counsel, filed a petition for a rehearing in this cause, and it is submitted on the petition.

The petition for rehearing filed by the foregoing order is as follows:

Petition for Rehearing.

Court of Appeals of Kentucky.

THE CITY OF NEWPORT *et al.*, Appellants,
against
THE NEWPORT LIGHT COMPANY, Appellee.

Petition for rehearing.

161 The appellee, The Newport Light Company, asks for a rehearing of this appeal, and particularly for a reconsideration of that part of the opinion wherein the court seems to decide that the appellant The City of Newport has the right to discontinue the taking of gas from the appellee, and that such discontinuance is not a violation of the mandate of the Louisville law and equity court embodied in its final judgment rendered on the 18th day of July, 1885, in the action between The Newport Light Company, plaintiff, and The City of Newport, defendant, and affirmed by this court on the 20th of May, 1886 (see opinion reported in 84th Kentucky Reports, page 166), because, as we respectfully submit, the court has overlooked the following propositions, which were duly submitted by counsel in the oral arguments made upon the hearing, and which we conceive are decisive of the questions raised upon this appeal:

1. That said judgment or decree of the chancellor which "perpetually enjoined and restrained the defendant, The City of Newport, and its officers, agents, etc., from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the city of Newport with gas or otherwise during the existence of the contract between the city of Newport and the Newport Light Company, and from discontinuing the taking of gas from the New-

port Light Company for the lighting of said places in such quantities as may be required for that purpose, according to the contract between said parties, so long as said contract shall remain in
162 force," is a final determination of the rights of the parties under said contract according to the terms of the decree, and cannot now be reversed, vacated, or modified except for a cause and in the mode prescribed by our Civil Code of Practice.

2. That the court by said judgment finally determined expressly:

a. That the city of Newport had no right to make any other contract for lighting its streets, etc., during the term of twenty-five years, for which its contract with the Newport Light Company was to remain in force.

b. That the city must take from the said light company gas in sufficient quantities to light said streets, etc., for the whole of said term.

c. That the making of such other contract was a violation of the rights of said light company under its contract with the city and a violation of the solemn mandate of this court.

d. That the city's refusal to take gas was a violation of said contract and said judgment.

e. That the Newport Light Company was entitled to the remedy by injunction to prevent such violations of said contract and should not be required to bring suit or a number of suits at law for damages for such breaches or the continuing breach of said contract.

3. That this court, by affirming said judgment, finally determined not only every question which was expressly —dged by the lower court, but finally determined against the city of Newport every
163 question which might have been made upon the appeal, and has no power after the term to vacate or modify its own judgment except for misprision of the clerk.

4. That the appellants, the mayor and members of the board of councilmen of the city of Newport, by adopting the resolution mentioned in the affidavit for the rule to answer for contempt to discontinue the taking gas for lighting the streets of the city, and by entering into the contract with the Suburban Electric Illuminating, Heating and Power Company for lighting said streets with electricity, in each case violated both the terms and the spirit of the orders of the court embodied in the said judgment of the Louisville law and equity court.

5. That every court has the power, and it is its duty when duly called upon, to enforce obedience to its own orders made within the scope of its jurisdiction.

6. That the light company has no right of action for damages for the violation of the injunction; that the proceeding for contempt is the usual remedy for such violations, and that is the only remedy which the company has for the enforcement of its adjudged rights.

7. That a denial of that remedy is a denial of the right which this court has solemnly and finally determined the appellee is entitled to.

I.

Upon the first proposition, we call attention to the fact, as
164 shown by the record, that the Dueber Light Company was not a party to the action in which the judgment violated by the appellants, the mayor and councilmen of Newport, was rendered or to the appeal from that judgment taken and prosecuted by the city of Newport, and that the controversy in that case, both in the lower court and in this court, was entirely between the Newport Light Company, on the one side, and the city of Newport, on the other. So that our plea of *res adjudicata* is a complete bar to the reopening of the case.

It is true that the other action brought by The Dueber Light Company against The Newport Light Company, to which The City of Newport was made a party by the defendant, involved the construction of the same contract, and was tried at the same time with this case in the lower court, but separate judgments were rendered and separate appeals were prayed and prosecuted in this court, although the two appeals were tried together. There was no consolidation.

The judgment which we claim has been disobeyed is found on page 48 of the record of the former appeal in this case. The two judgments appealed from in the other case are found on pages 60 and 61 of the transcript for the other appeal. Those judgments show what was determined in that action. They are as follows:

"It is adjudged that the defendant to the cross-petition, The City of Newport, is perpetually enjoined and restrained from taking any further steps or proceedings whatever with a view or for the purpose of conferring upon the plaintiff, The Dueber Light Company, any rights,
165 privileges, or authority of laying pipes in the streets, lanes, alleys, commons, or public places in said city for the purpose of supplying light to the said city and to the inhabitants thereof, and from making any contract or agreement with the Dueber Light Company looking to that end during the existence of the contract between the said city and the Newport Light Company.

"And it is further considered and adjudged by the court that the plaintiff, The Dueber Light Company, be, and is hereby, perpetually enjoined and restrained from laying down or attempting to lay down in the streets, lanes, commons, and public places in the city of Newport pipes or other fixtures for the purpose of furnishing gas to said city or to private consumers resident therein for illuminating purposes, and from digging or making any excavations in any of said places with a view of laying pipes therein for that purpose."

It will be seen that, although the determination of the controversy in that action may have incidentally involved the determination of the exclusive rights of the Newport Light Company under its contract with the city, the real questions determined were as to the right of the city to make a contract with and to grant a privilege to that particular corporation, the Dueber Light Company. The attempt on the part of the city to violate its contract with the Newport Light Company by making another contract with the

Dueber Light Company precipitated the fight between the Newport Light Company and the city, but neither the controversy with the Dueber Light Company nor the determination of that controversy by the lower court nor the affirmance of that judgment by
166 this court has anything to do with the determination of the questions raised upon this appeal, and, while there is nothing in that record to hurt the appellee here, we say it cannot be considered now in determining this case. The Dueber Light Company has been eliminated from this controversy.

The plaintiff, The Newport Light Company, in its petition against the city of Newport (see pages 4 to — of the transcript for former appeal in the case) alleged that it had entered into a contract with the defendant, The City of Newport, whereby the city had granted to it the exclusive privilege of using the streets and public places, etc., of the city for the purpose of laying pipes to convey and supply gas to the city and its inhabitants for the term of twenty-five years from and after the 11th day of June, 1882; that it was stipulated in said contract that the plaintiff was to furnish to the defendant, upon its several streets, lanes, alleys, and public places and buildings, at certain prices, a continuous supply of gas, in such quantities as the city might require and direct, for the use of the public streets, lamps, and public buildings owned by it during said term of twenty-five years; that the defendant's mayor and board of councilmen had adopted a resolution notifying the plaintiff that there was no existing contract between plaintiff and defendant for furnishing gas for lighting defendant's streets, etc., and that the defendant had not directed or required the plaintiff to supply gas for that purpose, and had adopted another resolution directing the city clerk to advertise for proposals for the lighting of the public high-
ways of the city of Newport with gas or electricity (see page
167 19 of record of former appeal for copy of resolution), and that it was the purpose of the defendant, in violation of said contract, to discontinue the taking of gas for lighting the streets, etc., from the plaintiff.

The seventh section of the contract, a copy of which was filed with the petition, is as follows:

"Said company may adopt any other mode equal to gas for supplying light to the city and its inhabitants, etc., provided the same shall be done at no greater expense to the city or consumers than the gas-light." (See page 18.)

The prayer of the petition was for "an injunction directed to the defendant and its officers and agents, enjoining them and each of them from making any contract with any person, company, partnership, or corporation for the lighting of defendant's streets, lanes, alleys, or public places, and from discontinuing the taking of gas from plaintiff for the lighting of said places in such quantities as it may require," etc. The temporary injunction followed the prayer, except that instead of "in such quantities as it may require" the words "in such quantities as may be required for that purpose" were used, thus showing by contemporaneous construction that the pronoun "it" did not refer to the city of Newport, but to the ne-

cessities of the case, and that the word "require" was used in the sense of need.

The petition shows that the controversy between the plaintiff and the defendant was both as to the validity of the contract and the construction to be put upon its terms, and particularly as to
168 the question as to whether the defendant had the option to take or refuse to take the quantity of gas necessary for lighting its streets. The court finally determined that the contract was valid and binding. The contract provided that it should remain in force for twenty-five years from the 11th of June, 1882. The court also determined that the city must take from the Newport Light Company the light necessary for lighting its streets, etc., during the whole of said term.

Section 518 of our civil code of practice mentions the cases in which the court, in which a judgment has been rendered, shall have power, after the expiration of the term, to vacate or modify it. The expression of one is the exclusion of the other. This court in the cases of Anderson *vs.* Anderson, 18 B. Monroe, 97; Hocker *vs.* Gentry, 3 Met., 463, and Scott *vs.* Scott's Ex'r, 9 Bush., 174, decided that the power of the court to vacate (or modify) its judgments and award new trials after the term is confined strictly to the causes mentioned in this section; and in Kennedy's Heirs, etc., *vs.* Meredith, 4th Monroe, 412, and in the same case of Scott *vs.* Scott's Ex'r, 9 Bush., 174, this court itself has no power to revoke or alter its mandate after the expiration of the term at which it was pronounced, but it must be carried out according to its true intent and meaning. We submit that the decision of the court upon this appeal is in conflict with these controlling decisions, to which the attention of the court was not drawn, through neglect or inadvertence of counsel.

169 II.

As to the second proposition, we say that the terms of the judgment enjoining the city of Newport from making any other contract for lighting its streets with gas or otherwise are unconditional. Its remaining in force is not made to depend upon the subsequent discovery or invention of some other mode of lighting, but it expressly excludes such a condition or upon the passage of an act of the legislature creating and authorizing some other company to make a contract with the city, but the inhibition applies to all corporations, both present and future.

The final decision of this court that the light company's only redress for violation of the contract is by action at law for damages would certainly be in conflict with the judgment of the lower court in this case perpetuating the injunction and with the controlling decision of this court affirming that judgment.

III.

In support of our third proposition we call the attention of the court to the cases of Mason, etc., *vs.* Mason, etc., 5 Bush., 193, and Davis, etc., *vs.* McCorkle, 14 Bush., 754. In the former this court decided:

"That all the errors and irregularities appearing in the original record and which could have been corrected by the appeal must now be regarded as settled and adjudicated and can afford
170 neither a cause for a review for a rehearing in the court below nor for correction now in this court. If they were not then discovered and presented by appellants and their counsel and escaped the attention of this court, it only shows the wisdom of the law in precluding a subsequent investigation by way of repose to litigants and penalty for laches in not presenting in proper time and manner errors then existing and apparent in the record."

In the other case this court quotes with approval the following, taken from Henderson *vs.* Henderson, 3 Hare, 115:

"Where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

We also quote the following from the opinion:

"With a view to the convenient dispatch of business, the speedy settlement of disputes, and the repose of society, courts long since established a rule that when a matter is once put in issue
171 and is passed upon by a court of competent jurisdiction it cannot be again litigated between the same parties so long as the former decision continues in force."

The court held that, although the question as to the proper construction of the bond sued on and the sufficiency of the petition was not discussed in the opinion delivered on the former appeal or in terms decided, it was directly in issue and was actually though not expressly decided by the reversal of the judgment below with instructions to cause the action to be prosecuted in the name of the receiver, etc.

We say that it was actually though not expressly decided by the Louisville law and equity court and by this court that the lower court had jurisdiction of the parties and the subject-matter of the action between the Newport Light Company and the city of Newport; that the insertion in the judgment of the words "by means of gas or otherwise" debarred the city of the right to diminish the quantity of gas necessary for lighting its streets, etc., which it was bound to take from the plaintiff by substituting some other mode of lighting. Can it be contended that any one of these questions was not directly put in issue on the former appeal or could not have been brought forward as part of the subject in contest and decided in favor of the appellant, The City of Newport? The 7th section of

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We say that it was actually though not expressly decided by the Louisville law and equity court and by this court that the lower court had jurisdiction of the parties and the subject-matter of the action between the Newport Light Company and the city of Newport; that the insertion in the judgment of the words "by means of gas or otherwise" debarred the city of the right to diminish the quantity of gas necessary for lighting its streets, etc., which it was bound to take from the plaintiff by substituting some other mode of lighting. Can it be contended that any one of these questions was not directly put in issue on the former appeal or could not have been brought forward as part of the subject in contest and decided in favor of the appellant, The City of Newport? The 7th section of

the contract between the Newport Light Company and the city shows that the parties in making it contemplated the use of some mode of lighting the streets other than by means of gas. The use of electricity for producing light was known before the date of that contract. The adoption by the board of councilmen of the
172 resolution mentioned in the light company's petition instructing the city to advertise for proposals for lighting the streets, etc., "with gas or electricity" shows that the officers of the city then had in view the adaptability of the newly discovered agency, and they cannot now set up the plea that on the hearing of the former appeal they did not know there was any such thing as electric light.

IV.

Mr. High, in his work on Injunctions, 3d edition, sec. 1416, says: "The granting of injunctions being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed." And in section 1433: "In determining whether an actual breach has been perpetrated, such as to warrant the court in committing for contempt, regard must be had to the terms of the injunction itself. In the case of The People *vs.* Sturtevant, 9 New York, 263, it was held that the effect of an injunction or decree restraining any acts of a corporate body and addressed in the ordinary way to it or its agents, etc., is to bind not only the intangible artificial being, but also the individuals who act for the corporation in the transaction of its business to whose knowledge the injunction or decree comes, and that the passage of a resolution by the common council of a city granting a right which they are forbidden by injunction to grant is a violation of the writ or decree, although the terms of the resolution or the conditions upon which the right was granted are not accepted by the grantee."

173 V.

We respectfully submit that the decision of the court upon this appeal is in conflict with the decisions of this court in Kaye *vs.* Kean, 18 B., Monroe, 840, and Gorham *vs.* Luckett, 6 B., Monroe, 640, to which the attention of the court was not drawn, through neglect or inadvertence of counsel. In the first-named case, Kean, having applied to the general council of the city of Louisville for a license to keep a tavern, with the privilége of selling spirit-ous liquors by retail, and his application having been refused, petitioned the circuit court for a writ of mandamus to compel the general counsel to comply with his request. The parties were heard in the circuit court, and a judgment rendered awarding a mandamus requiring the general council to grant such a license to the petitioner as he had applied for. The general council, of which Kaye was a member, refused obedience to the writ of mandamus, and for this refusal he with other members of that body were committed to jail for contempt and kept in custody for several days. The judgment of the circuit court was appealed from and reversed by this court

and remanded with directions to dismiss the petition. Then the appellant brought his action against the appellee for damages for false imprisonment. This court held that the circuit court had jurisdiction over the subject-matter, and might have awarded a mandamus against the general council under certain circumstances; that it was the duty of the appellant to have rendered obedience to the judgment so long as it remained in force unsuspended and unreversed, and that his contumacy subjected him to be proceeded against for contempt.

174 In the other case of Gorham *vs.* Luckett it was said that the members of the court "felt it to be their imperious duty, not only to decide the cases brought before the court, but to enforce their decisions in such manner as to afford that remedy and redress to the citizen which their opinion has determined he is entitled to. The power to decide without the power to enforce their decisions would be wholly unavailing to the injured party in whose favor they had decided and useless labor for the court. Every court, as incident to its power to decide, possesses the unquestionable power to enforce its judgments, orders, or decrees so long as they remain unreversed by some superior tribunal."

If the appellee is not entitled to the remedy by process for contempt to enforce obedience to the judgment which it has obtained, but must resort to its action at law for damages for the violation of its rights under the contract, what did it gain at the end of a long, tedious, and expensive litigation, when the highest court in the State decided that it was entitled to all it had asked for? Was it following an *ignis fatuus?* Is the judgment enjoining the city and its officers and agents a mere *brutum fulmen?* A very barren ideality, or did the chancellor mean what he said in his order of injunction that "the city of Newport, its officers and agents, are perpetually enjoined, first, from contracting with any person or corporation for lighting its streets and public buildings with gas or otherwise; second, that it and they were likewise enjoined from discontinuing the taking of gas from plaintiff (The Newport Light Co.) in quantities necessary for the purposes of light during

175 the life of said contract? And did this court mean what it said, affirming in an elaborate (and, as we think) a well-considered opinion the judgment of the chancellor perpetuating said injunction? But one other proposition remains to be suggested, and that is the act of the Kentucky legislature of 1890 which attempts to confer upon the appellant the right to violate its contract with the appellee and to violate the judgment of the court in the action between said parties.

That legislation of this character is unconstitutional we will not insult the intelligence of this court by even an attempt to argue.

In conclusion we have to say that the refusal of the city to take gas from the appellee injuriously affects the rights of the latter under the judgment in its favor by compelling it to bring suits to enforce its rights already adjudged to it, and if the city by substituting electric light for gas-light can diminish the quantity of gas which the appellee has the right to furnish under the contract, and

thereby alter the terms thereof, by supplying all the light necessary for lighting the streets, etc., by means of electricity, it could say that the gas-light was entirely unnecessary for that purpose, and in that way defeat any claim for damages on the part of the light company.

If the court cannot affirm the judgment appealed from, we ask it to modify its opinion by saying that the city is bound to continue to take gas from the appellee in such quantities as may be required for lighting its streets, lanes, alleys, and public places and
176 buildings undiminished on account of the use of additional light for that purpose by means of electricity or otherwise.

Very respectfully submitted by—

NELSON & DESHA,
Attorneys for Appellee.

J. G. CARLISLE, *Of Counsel.*

Authorities cited:

Anderson *v.* Anderson, 18 B. Monroe, 97.
Hocker *v.* Gentry, 3 Met., 463.
Scott *v.* Scott's Ex'r, 9 Bush., 174.
Kennedy's Heirs *v.* Meredith, 4 Monroe, 412.
Mason, etc., *v.* Mason, etc., 5 Bush., 193.
Davis *v.* McCorkle, 14 Bush., 754.
Henderson *v.* Henderson, 3 Hare, 115.
High on Injunctions, 3d edition, sections 1416 and 1433.
People *v.* Sturtevant, 9 New York, 263.
Kaye *v.* Kean, 18 B. Monroe, 844.
Gorham *v.* Luckett, 6 B. Monroe, 640.

Afterwards, on May 27, 1893, the following order was made herein:

Overruling Petition.

The court being sufficiently advised, it is considered that the petition for rehearing herein be overruled.

Afterwards, on June 3, 1893, the following order was entered herein:

177 Came appellee, by counsel, and filed a certificate of the chief justice of this court of the Federal question involved on the appeal herein.

The certificate filed by the foregoing order is as follows:

Court of Appeals of Kentucky.

CITY OF NEWPORT, Appellant,
vs.
NEWPORT LIGHT COMPANY, Appellee.

Upon the application of said Newport Light Company, appellee, it is certified by the court here that on the trial and hearing of this suit and case said appellee set up and relied upon the charter

granted to it by the General Assembly of the Commonwealth of Kentucky on the 27th day of March, A. D. 1880, which charter contains the following provision that "it might furnish any city, town, district, corporation or locality, or public institutions, or private persons with gas or other light for such time and upon such terms as may be agreed upon by the parties;" that said appellee further set up and relied upon a contract made between said appellee and appellant under and by virtue of an ordinance passed on the
178 third day of June, 1880, all the provisions of said ordinance being embodied in the aforesaid contract by the mayor and board of councilmen of the city of Newport, the appellant, the first, third, and seventh sections of which ordinance read as follows:

"SECTION 1. That from and after the passage of this ordinance, there shall be, and is hereby granted unto the Newport Light Company and their successors, the exclusive privilege of using any or all of the streets, lanes, commons, alleys and public places of the city, for the purpose of laying pipes to convey and supply gas to the said city of Newport and others; this privilege is granted for the term of twenty-five years from the date thereof, and until the city shall give said company twelve (12) months' notice to terminate the same, and embraces the right of said company to use said streets, lanes, alleys and public grounds for establishing and conducting said business."

"SECTION 3. The said Newport Light Company shall furnish to the city of Newport, upon the several streets, lanes, alleys and public places of the city of Newport, in which pipes are laid, a continuous supply of gas (equal in quality to Cincinnati gas) in such quantities as the said city may require, and direct for the use of the public street lamps and public buildings owned by the city, or ordered by the board of councilmen, at the rate of $1.20 per one thousand cubic feet; said board of councilmen shall determine what size burners shall be used, so that they shall not burn less than four feet to the hour for each, and the lighting thereof shall be regulated in such manner as may from time to time be directed by the board of council of the city of Newport. The amount of gas consumed by public street lamps and in public buildings owned by the city, to be ascertained by the customary meter measurement. Gas shall be furnished to the citizens for their private consumption at the following rates, viz: at $1.90 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1887; at $1.75 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of fifteen years from June 11th, 1892."

"SECTION 7. Said company or their successors may adopt any other mode equal to gas for supplying light to the city and its inhabitants, etc., provided that the same shall be done at no greater cost or expense to the city or consumers, than the gas-light."

That by an act of the General Assembly of the said Common-

wealth, passed on the 9th day of April, 1890, there was in-
179 corporated a company known at the trial and hearing on this suit and case as the Suburban Electric Illuminating, Heating and Power Company, the seventh section of which act is as follows:

"SECTION 7. The general nature of the business of the corporation shall be the erecting, operating and maintaining a general system of electrical dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat and power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants and other persons and corporations, and municipal corporations, located in or near said city, with light, heat and power by the electric current."

That under and by virtue of the authority of said act of said State the said appellant and said Suburban Electric Illuminating, Heating and Power Company on the 23rd day of April, 1891, made and entered into a contract by which the said company undertook and agreed to light the streets, alleys, and public places in said City of Newport, appellant, with electricity for the period of fifteen years, and said city agreed to pay for the same at the prices stated in said contract.

And it is further certified by the court here that on the trial and hearing of this suit and case in this court the validity of said act of the General Assembly incorporating the said Suburban Electric Illuminating, Heating and Power Company and the authority exercised under the same in making said contract between said appellant and said last-named company as aforesaid was drawn in question on the ground that the same impaired the obligation of the contract between the appellant and the appellee, before mentioned, and was repugnant to the Constitution of the United States, and that the decision of this the highest court of law and equity of this State in which a decision of this suit could be had was in
180 favor of the validity of said last-mentioned act of the said General Assembly and of the authority exercised thereunder by said appellant in making said contract with said Suburban Electric Illuminating, Heating and Power Company.

C. BENNETT,
Chief Justice of Kentucky.

The following are transcripts of records in cases of Deuber Light Co. and City of Newport *vs.* Newport Light Co., which were considered on the trial of this case:

181 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 20th day of May, A. D. 1886—W. S. Pryor, Jos. H. Lewis, and W. H. Holt, judges.

THE DUEBER LIGHT CO., Appellant,
vs.
THE NEWPORT LIGHT CO., Appellee.

THE CITY OF NEWPORT, Appellant,
vs.
THE NEWPORT LIGHT CO., Appellee.

Be it remembered that heretofore, to wit, on the 17th day of August, A. D. 1885, the appellant, The Dueber Light Company, by its counsel, filed a transcript of record in the office of the clerk of the Kentucky court of appeals in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law and Equity Court.

Pleas before the Honorable John G. Simrall, judge of the Louisville law and equity court, held at the court-house, in the city of Louisville, on the — day of ——, 1885.

182 THE DUEBER LIGHT COMPANY, Plaintiff,
vs.
THE NEWPORT LIGHT COMPANY, Defendant.

Be it remembered that on the 13th day of May, 1885, came the clerk of the Campbell circuit court and filed in the office of the clerk of the said Louisville law and equity court the transcript and papers, &c., herein.

Said transcript being in words and figures as follows, to wit:

STATE OF KENTUCKY:

Campbell Chancery Court, May Term, May 6th, 1885, at Newport.

Honorable J. W. Menzies, chancellor.

DUEBER LIGHT COMPANY, Plaintiff,
vs.
NEWPORT LIGHT COMPANY, &c., Defendant. } No. 2794. Orders.

Came the City of Newport and demurred to the cross-petition of the defendant, Newport Light Company.

And on the same —, to wit, on the 6th day of May, 1885, the following orders were made, to wit:

Came the City of Newport and filed answer to the cross-petition of the Newport Light Company, and the Newport Light Company demurred to said answer, and, by consent, this cause is transferred to the Louisville law & equity court, to be tried by Judge Simrall.

STATE OF KENTUCKY, }
183 *Campbell County.* }

I, John C. Schroll, clerk of the chancery court for the county aforesaid, do hereby certify that the foregoing page of written matter contains a full, true, and correct transcript of the orders made in said court in the *entire* styled action as the same appears of record in said court.

In witness whereof I hereunto set my hand as clerk aforesaid this 11th day of May, 1885.

JOHN C. SCHROLL, *Clerk*,
By A. L. RENCHER, *D. C.*

STATE OF KENTUCKY:

Campbell Chancery Court, at Newport.

DUEBER LIGHT COMPANY, Plaintiff, *vs.* NEWPORT LIGHT COMPANY, Defendant.	Memorandum of Papers and *Pendings* in the Within-styled Cause, No. 2794.

Original petition, No. 2794, filed February 26th, 1885.
Injunction bond filed February 26th, 1885.
Summons to Campbell Co. issued February 26th, 1885.
Order of injunction issued February 26th, 1885.
Demurrer, answer, and counter-claim and cross-petition filed April 2nd, 1885.
Injunction bond to city of Newport filed April 2nd, 1885.
Injunction bond to Dueber Light Co. filed April 2nd, 1885.
Summons on answer and cross-petition of Newport Light Co. against Dueber Light Co. issued April 2nd, 1885.
184 Summons on answer and cross-petition of Newport Light Co. against City of Newport issued April 2nd, 1885.
Order of injunction on answer and cross-petition of Newport Light Co. against City of Newport issued April 2, 1885.
Order of injunction on answer and cross-petition of Newport Light Co. against Dueber Light Co. issued April 2, 1885.
Affidavit of Samuel Bigstaff filed April 3rd, 1885.
Notice to Newport Light Co. filed April 4th, 1885.
Notice to John A. Williamson of motion to dissolve injunction filed April 4th, 1885.
Affidavit of John A. Williamson dated April 8th, 1885.
Order overruling motion to dissolve injunction filed April 11th, 1885.
Affidavit of John A. Williamson filed May 6th, 1885.
Answer of City of Newport to cross-petition of Newport Light Company filed May 6th, 1885.
Transcript of orders from Campbell chancery court.
Steps in case.
Statement of costs.

The original "petition," referred to in the foregoing transcript, is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff,
against
THE NEWPORT LIGHT COMPANY, Defendant. } Petition in Equity.

The plaintiff, The Dueber Light Company, says that it is
185 a corporation created under the laws of the State of Kentucky by articles of incorporation duly and regularly executed and filed for record in the clerk's office of Campbell county, at Newport, on the — day of February, 1885, with power to sue and be sued, contract and be contracted with, &c., as in said articles of incorporation set out.

Plaintiff says that among the said powers given it by said articles of incorporation are the following, to wit:

Plaintiff has full power and authority to contract with and supply to the citizens and inhabitants of the city of Newport gas for illuminating and other purposes, and to have, own, hold, and maintain all pipes, property, and fixtures necessary for said purposes.

Plaintiff says that upon the 19th day of February, 1885, while in the full possession of all said powers, it made application to the mayor and board of councilmen of the city of Newport then setting for the transaction of business, wherein it asked and prayed of the said the mayor and board of councilmen of said city to grant to plaintiff the right to lay in the streets, lanes, alleys, and public places of the said city pipes and all necessary apparatus and fixtures for the purpose of supplying the citizens and inhabitants of said city with gas for illuminating and other purposes, and plaintiff says that said petition was received by said mayor and board of councilmen and upon proper motion and second and upon the call of the yeas and nays therein the prayer of said petition was
granted to plaintiff, and that thereby this plaintiff was by
186 said mayor and board of councilmen given the right and authority to enter upon the streets, lanes, alleys, and public places of the city of Newport and upon any and all of said places and lay their pipes and all necessary fixtures for supplying the citizens and inhabitants of the said city with gas for illuminating and other purposes, and that plaintiff is now in full possession and enjoyment of said rights.

A copy of said petition and the proceedings therein is filed as part hereof, marked Exhibit "A."

Plaintiff says that upon the 3rd day of June, 1880, the said mayor and board of councilmen of the city of Newport passed an ordinance entitled "An ordinance further providing for the lighting of the city of Newport, Ky."

A copy of which ordinance is filed herewith as part hereof, marked Exhibit "B."

Plaintiff says that said ordinance so passed as aforesaid provides as follows, to wit:

"SECTION 1. That from and after the passage of this ordinance there shall be and is, hereby granted unto the Newport Light Company and their successors, the exclusive privilege of using any or al- of the streets, lanes, commons, alleys and public places of the city for the purposes of laying pipes to convey and supply gas to the city of Newport and others this privilege of twenty-five years from the date hereof, and until the city shall give the city twelve months' notice to terminate the same and embraces the right of said company to use said streets, lanes, alleys, and public
187 grounds for establishing and conducting said business."

Plaintiff says that The Newport Light Company, referred to in said ordinance, is the defendant herein, and that said defendant under and by virtue of said ordinance is now claiming and asserting that it has the sole and exclusive right to use the streets, lanes, alleys, commons, and public places of the city of Newport for the purpose of laying down and maintaining therein pipes and fixtures for the purpose of supplying the city of Newport and all others, including all the citizens and inhabitants thereof, with gas for illuminating and other purposes.

Plaintiff says that the defendant has no exclusive right for the said period of twenty-five years or for any other time, either by reason of said ordinance or in any other way.

Plaintiff says that the said the mayor and board of councilmen of the city of Newport at the time said ordinance was passed, to wit, on the 3rd day of June, 1880, had no right, power, or authority to grant or give to defendant or any other corporation or persons any exclusive right for twenty-five years or any other time to use the streets, lanes, alleys, commons, public places or any of them for the laying of pipes and other fixtures to supply gas to said city or to any other corporation, person, or persons, and that said alleged grant of said exclusive right wass at all times, has been, and is now absolutely void, null, and of no effect.

Plaintiff says that said defendant, now asserting and publicly claiming said exclusive right to the said use of said streets, &c.,
188 for said purposes, is also openly and publicly claiming and stating that this plaintiff has no right to use any of the streets, lanes, alleys, or public places of the city of Newport to lay pipes to supply the citizens and inhabitants thereof with light because of said alleged grant of exclusive right to it, and that defendants is in all and every possible means publicly and openly stating and claiming that this plaintiff has no rights whatever to lay in said streets or public places any pipes for said purpose.

And plaintiff says that its stock heretofore subscribed for is not fully paid up, and that by said assertion of exclusive right the defendant is clouding the right and franchises of plaintiff to conduct its said business in said city and is preventing payment of said stock subscription and the making of further subscription thereto.

Plaintiff further says that it is about to execute and enter into a detailed agreement and contract with the city of Newport for the purpose of fully carrying out said grant of right to it, and that this defendant is now using all means in its power to obstruct and pre-

vent said city from making said contract, and that under and by virtue of its said claim of exclusive right it is now about to enjoin and prevent this plaintiff and said city of Newport from entering into and carrying out said contract and grant and unless restrained by this court defendant will so do.

Plaintiff further says that said claim of exclusive right is now being made by defendant with the intent and for the purpose
189 of preventing this plaintiff from entering into any contract for the doing of said work and for the purchase of material therefor and is casting a cloud upon plaintiff's right to make or enter into any such contracts and thereby greatly embarrasses and hinders plaintiff in the prosecution of said work and the making of said contracts in which plaintiff says it is now engaged, and in collecting the amount of subscriptions to plaintiff's capital stock and in obtaining further subscription thereto.

Plaintiff says that unless restrained by order of this court defendant will greatly interfere with plaintiff as aforesaid, and that it will be greatly and irreparably damaged thereby.

Plaintiff says that no previous injunction has been granted herein, and that none has been refused by this court nor by any circuit judge nor by any other officer or court authorized to grant the same, and that the judge of this court, the Hon. John W. Menzies, is now absent from this country, and that the value of the matter in controversy herein is *of the* ten thousand dollars.

Wherefore plaintiff prays that this court make and issue*s* its order of injunction enjoining and restraining the defendant from claiming or settling of any exclusive right or privilege to the use of the streets, lanes, alleys, or public places of the city of Newport for the purpose of laying down and maintaining pipes and other
190 fixtures in the city of Newport to supply gas to the citizens and inhabitants of the city of Newport for the term of twenty-five years or for any other term, and that upon final hearing of this cause said injunction be made perpetual, and for all proper equitable relief.

HALLEN & MYERS,
Att'y- for Plaintiff.

Samuel Bigstaff says that he is president of the plaintiff, and that the statements of this petition are true.

SAMUEL BIGSTAFF.

Subscribed and sworn to before me this 26th day February, 1885.

JOHN C. SCHROLL, *Clerk*,
By A. S. RENSCHER, *D. M.*

Campbell Chancery Court.

THE DEUBER LIGHT COMPANY, Plaintiff,
against
THE NEWPORT LIGHT COMPANY, Defendant. } Affidavit.

The plaintiff, The Deuber Light Company, says that no previous injunction has been granted therein and that no injunction has been refused herein by this court or by any circuit judge, and that the judge of this court, the Honorable John W. Menzies, is now absent from Campbell county, and that great and irreparable injury will be done plaintiff if an injunction is not immediately granted herein.

DEUBER LIGHT COMPANY,
By SAMUEL BIGSTAFF, *Pres't.*

191 Samuel Bigstaff says that he is the president of the plaintiff, The Deuber Light Company, and that the statement- of this affidavit *affidavit* are true.

SAMUEL BIGSTAFF.

Sworn to before me by Sam'l Bigstaff this 26th day of February, 1885.

JOHN C. SCHROLL, *Clerk,*
By A. S. RENSCHER, *D. M.*

Campbell Chancery Court.

THE DEUBER LIGHT COMPANY, Plaintiff,
against
THE NEWPORT LIGHT COMPANY, Defendant. } Order of Injunction.

The defendant, The Newport Light Company, is hereby restrained and enjoined until further orders of this court from asserting and claiming or setting up any exclusive right to use the streets, lanes, alleys, commons, or public places of the city of Newport for the purpose of laying down or maintaining their pipes and fixtures for the supplying gas to the citizens and inhabitants of the city of Newport for a period of twenty-five years or for any other term.

February 26th, 1885.

JOHN C. SCHROLL,
Clk C. C. Court

The injunction bond filed February 26th, 1885, and referred to in said transcript is in words and figures as follows, to wit:

Campbell Chancery Court.

192 THE DEUBER LIGHT COMPANY, Plaintiff,
against
NEWPORT LIGHT COMPANY, Defendant. } Injunction Bond.

We undertake that the plaintiff, The Deuber Light Company, shall pay to the defendant, Newport Light Company, the damages

which it may sustain by reason of the injunction in this action if it be finally decided that it ought not to have been granted.

Witness our hands this 26th day of February, 1885.

DEUBER LIGHT COMPANY,
By SAMUEL BIGSTAFF, *President.*
SAMUEL BIGSTAFF.
F. C. MILLER.

Attest: JOHN C. SCHROLL, *Clk,*
By A. S. RENSCHER, *D. M.*

The sheriff's return upon the summons filed with said transcript is in words and figures as follows, to wit:

Executed the within process this 26th day of February, 1885, on the Newport Light Company by delivering a copy hereof to John A. Williamson, president of said company, he being the highest officer of said company found in my county.

F. REICHMAN, *Sheriff,*
By J. S. PHUMMER, *D. M.*

Sheriff's return on the order of injunction issued 26th of February, 1885, is in the words and figures as follows, to wit:

193 Executed the within process this 26th day of February, 1885, on the Newport Light Company by delivering a copy hereof to John A. Williamson, president of said company, *a copy hereof*, he being the highest officer of said company found in said county.

E. REICHMAN, *Sheriff,*
By J. L. PHUMMER, *D. S.*

The demurrer, answer, counter-claim, and cross-petition filed with said transcript is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY
v.
THE NEWPORT LIGHT COMPANY, Defendant.
} Demurrer, Answer, and Counter-claim and Cross-petition.

The defendant comes and demurs to the petition herein.

And not waiving its said demurrer, but relying upon same, the defendant by way of answer to said petition says that it has no sufficient knowledge or information to found a belief as to whether plaintiff has or has not the corporate right or authority under the laws of this State to do business under its alleged corporate name.

It denies that it was in possession of such authority on the 19th day of February, 1880, or that the alleged grant to it by the mayor and board of councilmen of the city of Newport was effective

194 or operated to confer upon plaintiff the right in law to lay in the streets, lanes, alleys, and public places of said city pipes and all necessary apparatus and fixtures for the purpose of supply-

ing gas to the inhabitants thereof; it denies that plaintiff is now in the possession and enjoyment of said right, or that any claim or assertion of right by this defendant to the exclusive use of said streets, lanes, alleys, common-, and public places is casting or has cast any cloud upon any right of which plaintiff is possessed or upon any right in plaintiff to make or enter into any contract with said city or to conduct business in said city, or is preventing payment of stock and subscriptions or the making of other subscriptions thereto, or that plaintiff is embarrassed or hindered in the prosecution of said work or the making of said contracts or of collecting subscriptions to pl'tff's stock or in obtaining other subscriptions thereto, or that plaintiff will be damaged either irreparably or otherwise by any such claim or by any interference whatever on the part of defendant.

Defendant says that it is a body corporate and politic under the laws of this State, with power, among other things, to sue and be sued, contract and be contracted with, and to furnish any city, town, district, corporation, public institution, manufacturing establishment, or private premises with gas or other light for such time and upon such terms as may be agreed upon by the parties, and for the purposes of said business to acquire by *purpose* or other lawful mode such property, real or personal, as it might re-
195 quire in its business and to dispose thereof. It admits that on the 5 day of June, 1880, the mayor and board of councilmen of said city of Newport passed an ordinance entitled as in the petition set forth, and that the first section thereof is as set forth in said petition. It says that said ordinance embraces the contract between this defendant and said city for the furnishing of gas to it in its corporate capacity and to private consumers resident therein; that in addition to said first section said contract stipulated and provided, among other things, that this defendant should furnish to said city a continuous supply of gas equal in quality to Cincinnati gas in such quantities as the said city might require and direct for the use of the street lamps and buildings owned by it at the rate of $1.20 per 1,000 cubic feet, said city to determine what sized burners to be used, so that they should not be less than four feet to the hour for each, the lighting thereof to be regulated from time to time by said city, the amount consumed to be ascertained by meter measurement, gas to be furnished said citizens for private use at $1.90 per 1,000 cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1882, at $1.80 per 1,000 cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1887, and at $1.75 per 1,000 cubic feet, with five per cent. off for cash within ten days, for the period of fifteen years from June 11th, 1892; that all street lamps, lamp posts and fixtures appertaining thereto should be furnished by and at the expense of this defendant and erected at such times,
196 points, and in such numbers as the said city might direct; that inasmuch as the them existing contract between said city and the Covington Gas Light Company would expire on the 11th day of June, 1882, by the terms whereof the said city, or those

with whom it might contract thereafter to light it, might purchase the pipes, lamp post-, fixtures, etc., of said company in said city in accordance with a prescribed mode of valuation, it was stipulated that in consideration of the undertakings of this defendant in said contract of June 3d, 1880, it should have said right of purchase with all privileges incident or relating thereto, which purchased this defendant by said contract bound itself, in consideration of the privileges and rights conferred upon it by said contract, to make, and also to light said city thereafter according to the terms and conditions of said contract, and finally that this defendant should, within fourteen days from the date of said ordinance, signify in writing its acceptance of same as a contract, whereupon it should "become a binding contract" between said city and this defendant, it being further provided that within twenty days from said date this defendant should execute bond, with good and approved security, to said city for the faithful performance of all and singular its duties under said contract; and defendant says that it did, within the prescribed time, signify its acceptance of said contract in writing, and that within twenty days from said date it did execute and deliver to said city its bond, with good and approved security, conditioned as therein required. It further says that thereafter,
197 to wit, on the — day of ——, 188–, it entered in good faith and with all proper diligence upon the performance of all and singular its duties under said contract according to the terms and conditions thereof; that in so doing it has necessarily made great and burdensome outlays and expenditures in money and material, amounting in the aggregate to more than one hundred thousand dollars; that it has likewise and of necessity expended great labor and been put to much trouble and pains in the due and proper performance of its several covenants aforesaid; that, relying in good faith upon said contract, it has purchased from said Covington Gas Light Company, as therein provided, its pipes, lamp posts, fixtures, etc., at great expense, to wit, more than sixty thousand dollars; that in addition thereto —, under said contract, have been made at a cost of more than forty thousand dollars; that these large sums have been necessarily expended under said contract and in reliance thereupon, as said city well knew and with its approval; that it has ever since duly and regularly proceeded with the knowledge and consent of said city in the execution of said contract until about the — day of January, 1885, when said city, by its mayor and board of councilmen, in conjunction with the plaintiff, which also had knowledge of said facts, commenced to combine and conspire to ignore and repudiate said contract and to annoy — harrass this def't; that this defendant has, nevertheless, continued in the faithful performance of said contract in all respects and is still ready, willing, and able to do so according to all the requirements thereof, as is well known to said city; that said con-
198 tract as to all the matters herein set up in an executed contract, and defendant denies that said city had no lawful power or authority to make said contract or to grant to this defendant the exclusive right to use said streets, lanes, alleys, etc., for the

purpose of furnishing gas as therein provided, and defendant says that said exclusive privilege was granted it by reason of the consideration therein expressed and especially in consideration of the public service to be rendered and which has been and is being rendered by this defendant to said city in its municipal capacity and to all the citizens thereof by furnishing it and its said citizens with lights at stipulated price, by the purchase in its stead at great expense — the property, consisting of pipes, lamp posts, fixtures, &c., of said Covington Gas Light Company, by laying pipes and erecting lamp posts upon unlighted streets and public places in said city, by cleaning, lighting, and keeping in repair said lamps, and by the performance of the several other duties imposed upon it by said contract, all which — is doing at great and burdensome expense of labor, time, money, and material.

And defendant says that but for the exclusive privilege so granted of furnishing light to both said city and the private consumers resident therein and the exclusive use of the streets, etc., of said city for that purpose it would not have entered into said contract and could not have afforded to do so, as said city well knew at the time; that said city is heavily indebted and so embarrassed and involved financially that if defendant is not protected in its rights
199 under said contract by the extraordinary process of this court it will be without remedy whatever except the uncertain, embarrassed, and wholly inadequate one of an action at law for the breach thereof. Defendant says that the plaintiff is about to commence the work of laying pipes in the streets, lanes, alleys, commons, and public places of said city of Newport, under the pretended grant in the petition set forth, for the purpose of furnishing gas to said city and to the citizens thereof; that unless restrained plaintiff will lay said pipes as aforesaid; that to that end plaintiff has already placed a large number of gas pipes upon some of the main streets of said city; that by this means and by continually asserting its right so to do and to furnish gas as aforesaid in defiance of defendant's fair contract and by asserting that defendant has no valid contract whatever with said city this defendant is being and will continue to be crippled and injured in its business, prevented from enlarging its business, and brought into public disfavor, all which plaintiff is combining with said city in bad faith to do and will continue to do unless restrained by order of this court, and defendant says that it is the purpose of said city, acting in conjunction with plaintiff and in bad faith, to wilfully and of its own wrong repudiate its said contract with defendant, and that unless restrained still further steps and proceedings to that end will be taken by it.

Wherefore defendant prays that this court make an- issue its order of injunction enjoining and restraining the plaintiff from laying down or attempting to lay down in the streets, lanes,
200 commons, alleys, and public places in said city of Newport pipes or other fixtures for the purpose of furnishing gas to said city or to private consumers resident therein for illuminating purposes and from digging or making any excavations in any of said places with the view of laying pipes therein for that purpose;

that this — its answer and counter-claim as to the plaintiff, and that as to said city of Newport it be taken and permitted to stand as its cross-petition and said city be made a defendant hereto; that an order of injunction issue enjoining and restraining said city of Newport from taking any further steps or proceedings whatever with a view or for the purpose of conferring upon the plaintiff, The Dueber Light Company, any right, privilege, or authority of laying pipes in the streets, lanes, alleys, commons, or public places of said city for the purpose of supplying gas to said city or to the inhabitants thereof and from making any contract or agreement with said company looking to that end; that on the hearing both said injunctions be made perpetual and defendant's right to the exclusive use of said streets, etc., for the purposes aforesaid for the period of twenty-five years from the 11th day of June, 1882, be declared by judgment of this court, and for all proper relief in the premises.

CARLISLE AND CARLISLE AND
NELSON AND WASHINGTON,
Att'ys for Defendant.

John A. Williamson says that he is president of the de-
201 fendant The Newport Light Company, and that the statements contained in the foregoing answer and counter-claim and cross-petition are true as he believes; that no injunction has been granted herein on behalf of said defendant, and that no injunction has been refused herein by this court or by any circuit judge, and that the judge of this court is now absent from this county, and that irreparable injury will result to said defendant if an injunction be not immediately granted as to the plaintiff as prayed for, and that irreparable injury will result to said defendant if an injunction be not immediately granted as to said city of Newport as prayed for.

JOHN A. WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson this 2nd day of April, 1885.

JOHN C. SCHRALL, *Clerk.*

STATE OF KENTUCKY, }
Campbell County. }

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, }
vs. } Order of Injunction.
THE NEWPORT LIGHT COMPANY, Defendant. }

The defendant to the cross-petition herein, The City of Newport, is hereby enjoined and restrained until the further order of this court from taking any further steps or proceedings what-
202 ever with a view or for the purpose of conferring upon the plaintiff, The Dueber Light Company, any rights, privilege, or authority of laying pipes in the streets, lanes, alleys, commons, or public places in said city for the purpose of supplying gas to

said city or to the inhabitants thereof, and from making any contract or agreement with said *Quebec* Light Company looking to that end. This 2nd day of April, 1885.

JOHN C. SCHRALL,
— *Campbell Chancery Court.*

STATE OF KENTUCKY, }
Campbell County. }

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, }
vs. } Order of Injunction.
THE NEWPORT LIGHT COMPANY, Defendant. }

The plaintiff, The Dueber Light Company, is hereby enjoined and restrained until the future order of this court from laying or attempting to lay in the streets, lanes, alleys, commons, or public places of the city of Newport any pipes or other fixtures for the purpose of furnishing gas to said city or to the inhabitants thereof, and from digging or making any excavations in any of said streets, lanes, alleys, commons, or public places with a view of placing pipes therein for the purposes aforesaid.

This 2nd day of April, 1885.

JOHN C. SCHRALL,
Clerk Campbell Chancery Court.

203 The injunction bond to the city of Newport, filed April 2nd, 1885, and referred to in said transcript, is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, }
against } No. 2794. Injunction
THE NEWPORT LIGHT COMPANY and THE CITY OF NEWPORT, Defendants. } Bond.

We undertake that the defendant The Newport Light Company shall pay to the city of Newport the damages which city of Newport may sustain by reason of the injunction in this action, if it be finally decided that said injunction ought not to have been granted.

Witness our hands this 2nd day of April, 1885.

JOHN A. WILLIAMSON.

Attest: JOHN C. SCHRALL, *Clk*,
By A. S. RENSCHER, *D. M. C.*

The injunction bond to the Dueber Light Company referred to in the said transcript is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, *against* THE NEWPORT LIGHT COMPANY, &c., Defendants. } No. 2794. Injunction Bond.

We undertake that the defendant The Newport Light Company shall pay to the plaintiff, The Dueber Light Company, the
204 damages which it may sustain by reason of the injunction in this action, if it be finally decided that said injunction ought not to have been granted.

Witness *our* hands this 2nd day of April, 1885.

JOHN A. WILLIAMSON.

Attest: JOHN C. SCHROLL, *Clk*,
By A. S. RENSCHER, *D. C.*

The sheriff's return on summons on the cross-petition of the Newport Light Company is in words and figures as follows, to wit:

Executed April 2nd, 1885, upon the Dueber Light Company by delivering to Samuel Bigstaff, president of said company, a copy hereof.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

Executed April 2nd, 1885, upon the city of Newport by delivering to James C. Wright, mayor of said city, a copy hereof.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

And the sheriff's return on the order of injunction on said cross-petition is in words and figures as follows, to wit:

Executed April 2nd, 1885, by delivering to James C. Wright, mayor thereof, a copy of the within order of injunction.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

205 Executed April 2nd, 1885, upon the Du-ber Light Company by delivering to Samuel Bigstaff, president of said company, a copy of the within order of injunction.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

And the affidavit of Samuel Bigstaff filed on the 3rd day of April, 1885, is in words and figures as follows, to wit:

Samuel Bigstaff says he is president of the plaintiff corporation and that John A. Williamson is president of the defendant corporation; that on the 2nd day of April, 1885, the said John A. Williamson, well knowing that the injunction granted to plaintiff in this cause enjoining and restraining the assertion by defendant of an exclusive right to use the streets, lanes, alleys, commons, or public

said city or to the inhabitants thereof, and from making any contract or agreement with said *Quebec* Light Company looking to that end. This 2nd day of April, 1885.

JOHN C. SCHRALL,
— *Campbell Chancery Court.*

STATE OF KENTUCKY, }
Campbell County. }

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, }
vs. } Order of Injunction.
THE NEWPORT LIGHT COMPANY, Defendant. }

The plaintiff, The Dueber Light Company, is hereby enjoined and restrained until the future order of this court from laying or attempting to lay in the streets, lanes, alleys, commons, or public places of the city of Newport any pipes or other fixtures for the purpose of furnishing gas to said city or to the inhabitants thereof, and from digging or making any excavations in any of said streets, lanes, alleys, commons, or public places with a view of placing pipes therein for the purposes aforesaid.

This 2nd day of April, 1885.

JOHN C. SCHRALL,
Clerk Campbell Chancery Court.

203 The injunction bond to the city of Newport, filed April 2nd, 1885, and referred to in said transcript, is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, }
against } No. 2794. Injunction
THE NEWPORT LIGHT COMPANY and THE CITY OF NEWPORT, Defendants. } Bond.

We undertake that the defendant The Newport Light Company shall pay to the city of Newport the damages which city of Newport may sustain by reason of the injunction in this action, if it be finally decided that said injunction ought not to have been granted.

Witness our hands this 2nd day of April, 1885.

JOHN A. WILLIAMSON.

Attest: JOHN C. SCHRALL, *Clk*,
By A. S. RENSCHER, *D. M. C.*

The injunction bond to the Dueber Light Company referred to in the said transcript is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DUEBER LIGHT COMPANY, Plaintiff, *against* THE NEWPORT LIGHT COMPANY, &c., Defendants. } No. 2794. Injunction Bond.

We undertake that the defendant The Newport Light Company shall pay to the plaintiff, The Dueber Light Company, the
204 damages which it may sustain by reason of the injunction in this action, if it be finally decided that said injunction ought not to have been granted.

Witness *our* hands this 2nd day of April, 1885.

JOHN A. WILLIAMSON.

Attest: JOHN C. SCHROLL, *Clk*,
By A. S. RENSCHER, *D. C.*

The sheriff's return on summons on the cross-petition of the Newport Light Company is in words and figures as follows, to wit:

Executed April 2nd, 1885, upon the Dueber Light Company by delivering to Samuel Bigstaff, president of said company, a copy hereof.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

Executed April 2nd, 1885, upon the city of Newport by delivering to James C. Wright, mayor of said city, a copy hereof.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

And the sheriff's return on the order of injunction on said cross-petition is in words and figures as follows, to wit:

Executed April 2nd, 1885, by delivering to James C. Wright, mayor thereof, a copy of the within order of injunction.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

205 Executed April 2nd, 1885, upon the Du-ber Light Company by delivering to Samuel Bigstaff, president of said company, a copy of the within order of injunction.

F. REICHMAN, *Sheriff C. C.*,
By T. K. HUTCHINSON, *D. S.*

And the affidavit of Samuel Bigstaff filed on the 3rd day of April, 1885, is in words and figures as follows, to wit:

Samuel Bigstaff says he is president of the plaintiff corporation and that John A. Williamson is president of the defendant corporation; that on the 2nd day of April, 1885, the said John A. Williamson, well knowing that the injunction granted to plaintiff in this cause enjoining and restraining the assertion by defendant of an exclusive right to use the streets, lanes, alleys, commons, or public

places of the city of Newport for the purpose of laying down or maintaining therein pipes and other fixtures for supplying gas to the citizens and inhabitants of said city was in full force, did wilfully violate said injunction as follows, to wit: The said John A. Williamson did present to the clerk of this court a pleading of said defendant in this cause entitled "demurrer, answer, counter-claim, and cross-petition," and verified the same before the said clerk and caused same to be marked filed by said clerk, and, asserting such exclusive right in said pleading, caused said clerk to issue thereon an order of injunction purporting to enjoin and restrain this plaintiff from laying or attempting to lay in said streets, lanes, alleys, com-
206 mons, or public places any pipes or other fixtures for the purpose of furnishing gas to said city or its inhabitants, and caused said order to be served on this plaintiff and publication thereof to be made in the newspapers circulating in said city, and thereby the said John A. Williamson disregarded and violated said first-mentioned order of injunction and sought to render the same nugatory and ineffectual.

SAMUEL BIGSTAFF.

Subscribed and sworn to before me by the said Samuel Bigstaff this 3rd day of April, 1885.

JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

And the notices filed April 4th, 1885, and referred to in said transcript are in words and figures as follows, to wit:

Notice.

The defendant, The Newport Light Company, will take notice that on Wednesday, April 18th, 1885, at 12 o'clock m., at the court-house, at Falmouth, Pendleton county, before Hon. John W. Menzies, chancellor of this court, the plaintiff The Dueber Light Company and also the City of Newport will jointly and separately move, upon the pleadings and affidavits of said Newport Light Company alone, to dissolve the injunction granted by the clerk the 2nd day of April, 1885, upon the pleadings and affidavits of said Newport Light Company.

HALLAM & MYERS,
J. C. WRIGHT,
E. W. HAWKINS,
Att'y- for City of Newport.

207 Executed the within notice this 3rd day of April, 1885, by delivering a copy thereof to John A. Williamson, president of the within-named Newport Light Company.

F. REICHMAN,
By J. L. PHUNNER, *D. S.*

Notice.

John A. Williamson is hereby notified that at 12 o'clock m., noon, at the court-house, at Falmouth, Pendleton county, the plaintiff will move Hon. John W. Menzies, chancellor of this court, that an attachment issue against him, the said John A. Williamson, for contempt of court in disobeying the injunction granted against the defendant, The Newport Light Company, in this cause, as more particularly set forth in an affidavit of Samuel Bigstaff this day filed in this cause.

HALLAM & MYERS,
J. C. WRIGHT,
Att'ys for Plaintiff.

Executed the within notice this 3rd day of April, 1885, by delivering to the within-named John A. Williamson a true copy thereof.

F. REICHMAN, *Sh'ff*,
By J. L. PHUMMERT, *D. S.*

The affidavit of John H. Williamson, dated April 8th,
208 1885, and filed with said transcript, is in words and figures as follows, to wit:

The affiant, The Newport Light Company, says that it verily believes that it cannot get a fair and impartial trial of this cause or the motions of which notice has been given therein, pending and set for this day, by the presiding judge of this court.

THE NEWPORT LIGHT CO.,
By JNO. A. WILLIAMSON, *President.*

John A. Williamson says that he is the president of the Newport Light Company, and that he verily believes the statements above made are true.

JOHN A. WILLIAMSON.

Subscribed and sworn to before me by John A. Williamson this 8th day of April, 1885.

GEO. R. REELE,
M. Comm'r.

The order overruling motion to dissolve injunction is in words and figures as follows, to wit:

Campbell Chancery Court.

THE DAUBER LIGHT COMPANY, Plaintiff,
vs. Order.
THE NEWPORT LIGHT COMPANY, Defendant.

The court being sufficiently advised, it is ordered that the motion to dissolve the injunction obtained by the defendant against the plaintiff and the city of Newport be, and is hereby, overruled.
209 This order will be filed by the clerk and obeyed accordingly.

The affidavit of John A. Williamson, filed May 6th, 1885, is in words and figures as follows, to wit:

John A. Williamson says that he is president of the defendant, The Newport Light Company, and that the presiding chancellor of this court will not, as he believes, afford said defendant a fair and impartial hearing of the matters in controversy in this cause upon the original and cross petitions herein.

JOHN A. WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson this 6th day of April, 1885.

JOHN C. SCHROLL, *Clk*,
By C. E. ALLEN, *D. C.*

And the answer of the City of Newport to the cross-petition of the Newport Light Company is in words and figures as follows, to wit:

The City of Newport comes and demurs to the cross-petition of the cross-petitioner, The Newport Light Company, because there is presented no cause of action against this defendant.

The defendant, not waiving but insisting upon its demurrer, by way of answer says that there is pending in this court an action, No. 2793, instituted by the said Newport Light Company
210 *vs.* City of Newport, the record of which is referred to and, if necessary, made a part hereof, which presents the same cause of action and asking for the same relief as is presented and asked in the present action, and defendant asks that this action be dismissed.

The defendant, The City of Newport, waiving none of its objections to the many errors and imperfections in plaintiff's X petition contained, but still relying and insisting upon its general demurrer to plaintiff's said X petition, for further — thereto states that long after the said alleged contract in plaintiff's petition mentioned was signed, to wit, on the 10th day of January, 1884, the said defendant, through its city council and at a regular meeting thereof, adopted the following resolutions, to wit:

"Resolved, That the city clerk be, and is hereby, directed to advertise for bids for lighting the public lamps of the city for the year ending February 1st, 1885, bids for same to be received at our next regular meeting." A copy of said resolution is herewith filed and made a part hereof, marked Exhibit "A."

Defendant further states that afterwards, to wit, on the 24th day of January, 1884, the same being the next regular meeting of said city council after the said 10th day of January, 1884, the said city council did regularly meet in accordance with the provisions of its charter and ordinances; that at said time certain bids, in response to said resolution as of the 10th of January, 1884, were presented for lighting and extinguishing the public lamps of the said de-
211 fendant for the year ending February 1st, 1885; that among said bids was the bid of the X petitioner, and which is in words and figures as follows, to wit:

NEWPORT, KY., *January 24th*, 1884.

To the hon. mayor and board of councilmen of the city of Newport.

GENTLEMEN: The Newport Light Company will furnish the gas and clean the public gas lamps of the city, keep the posts, lamps, lamp frames, service cocks, burner tips, &c., in thorough repair and order, guaranteeing the city against any and all expense or outlay of any kind or description, four-feet burners to be used and moonlight schedule to be adopted, for the sum of $20.25 per light per annum.

NEWPORT LIGHT COMPANY.
R. L. HAWTHORN, *Secretary.*

A copy of said bid is herewith filed and made part hereof, marked Exhibit "B."

Defendant further states that at the aforesaid time, to wit, the 24th January, 1884, the cross-plaintiff's said bid, together with others, upon motion, was regularly referred to the committee of said city council on gas, according to the provisions of said city's charter and ordinances, to wit, by a majority vote of the council upon a call of the yeas and nays; that the said committee of the aforesaid resolution were instructed to examine into and report back to the board if there could not be devised some more satisfactory plan of lighting and caring for the public lamps of the city, &c. A copy of
212 said resolution referring said bids to said committee is herewith filed and made a part hereof, marked Exhibit "C."

Defendant further states that afterwards, to wit, on the 21st day of February, 1884, and upon the next regular meeting of said city council the aforesaid committee on gas did make a report, which is in substance as follows:

FEB'Y 21ST, 1884.

The committee on gas, to whom was referred the various proposals for the lighting, extinguishing, and care of the public gas lamps of the city, beg leave to report that they have examined the same, &c., and, in view of the unsatisfactory results of the past, recommend that the proposition of the Newport Light Company to keep the posts, lamps, lamp frames, service cocks, burners, tips, &c., in thorough repair and order, guaranteeing the city against any and all expense or outlay of any kind during their contract, for the sum of $20.25 per light per annum, be accepted with the understanding that wherever it shall appear from proper examinations that an average of ten lights per night for a period of a week are not burning from any cause within the control of said light company it shall be charged with the cost of the loss sustained by the city, this same to be ascertained by an average with the contract price.

Copy of said report is herewith filed and made part hereof, marked Exhibit "D."

Defendant further says that at the time, to wit, February 21st, 1884, during the said regular meeting, the aforesaid report was, ac-

cording to the defendant's charter and ordinances, regularly
213 adopted, to wit, by a majority *of* vote of the members of said
council, upon a call of the yeas and nays. A copy of said resolutions adopting the said report is herewith filed and made part hereof, marked Exhibit "E."

Defendant further states that at and during said regular meeting on the said 21st day of February, 1884, a motion that the contract be awarded to the Newport Light Company, as recommended by the committee, was also adopted by the defendants through its said city council in the mode prescribed by its said charter and ordinance, to wit, by a majority vote of the said board of council upon the call of yeas and nays. A copy of said motion and its adoption is herewith filed and made part hereof, marked Exhibit "F."

Defendants further states that if there ever was a valid contract existing between the plaintiff and defendant before the 21st day of February, 1884, which defendant denies, the same has been superseded by that adopted by defendant on the 21st day of February, 1884, and defendant states that this plaintiff, The Newport Light Company, immediately after the 21st day of February, 1884, accepted each and all of this provision of said contract as set forth in the report of the said committee on gas; that immediately thereafter they began acting under the same, and have been continuously doing so ever since, until February 8th, 1885; that said contract, as set forth in said report, was to continue in force for one year only, and that said year has long since past.

214 Wherefore defendant prays that the said cross-petition be dismissed and the injunction be dissolved, with damages, and for all further proper relief.

E. W. HAWKINS,
City Att'y, Att'y for Defendant.

And at a court held for the court aforesaid on the 29th day of May, 1885.

This action, having been heard on pending demurrers, was submitted.

The court, being now sufficiently advised, delivered a written opinion herein, which was ordered to be and now is filed.

It is considered that the demurrer of the Dueber Light Company to the answer, counter-claim, and cross-petition of the Newport Light Company be and the same is now overruled.

And it is further considered that the demurrer of the Newport Light Company be and the same is now sustained; to all which the Dueber Light Company excepts.

It is further considered and ordered that the injunction against the city of Newport be and the same is now made perpetual in the case of The Newport Light Company against The City of Newport; to which the City of Newport excepts.

Said opinion is in words and figures as follows, to wit:

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT, Defendant,

215 and

DUEBER LIGHT CO., Plaintiff,
vs.
NEWPORT LIGHT CO., Defendant.

Opinion by Judge Simrall.

These actions were transferred to this court from the Campbell chancery court. They involve substantially the same questions and were heard together. On the 17 Feb'y, 1874, the legislature of Kentucky passed "An act to revise and amend the charter of the city of Newport."

By the 6th section of said act the city of Newport was given power "to construct, maintain, and operate gas and water works and to pass all ordinances necessary to regulate the same, provided that no existing contract shall be affected thereby." See Acts 1873–'4, p. 333.

In 1879–'80 the Newport Light Company was incorporated by act of the legislature, and was empowered to "furnish any city, town, district, corporation, or locality, or any public institution, manufacturing establishment, or private premises with gas or other light, for such time and on such terms as may be agreed upon by the parties."

In pursuance thereof the Newport Light Company entered into a contract (by ordinance) with the city of Newport in 1880, by which, amongst other things, it was stipulated that the Newport Light Company should have the exclusive privilege of using any and all streets, lanes, commons, and alleys and public places of said
216 city for the purpose of laying pipes to convey and supply gas to it and others, said privilege to be so enjoyed and used for the term of twenty-five years, and until the city should give said company twelve months' notice to terminate the same; that said company should furnish the city of Newport, upon its several streets, alleys, and public places in which pipes were so laid, a continuous supply of gas equal in quality to Cincinnati gas, in such quantities as the city might require and direct, for the use of the public street lamps and public buildings owned by it or ordered by the board of councilmen, at the rate of one and $\frac{20}{100}$ dollars per thousand cubic feet.

There are many details to said contract, which provides for furnishing gas also to the citizens on terms named, and also for the purchase by said Newport Light Co. of the pipes, lamp posts, fixtures, &c., of the Covington Gas Light Company, and then for the purchase of said property by the city of Newport from the Newport Light Company in certain contingencies upon the terms and conditions in said contract specified.

Accordingly the Newport Light Co. entered upon the execution of said contract and expended in so doing over one hundred thousand dollars in the purchase of property, making extensions, laying pipe, &c.

In February, 1885, "the Dueber Light Company was incorporated by recording articles in the county clerk's office of Campbell county under the general laws of the State of Kentucky, with power to contract with and supply to the citizens and inhabitants of the city of Newport gas for illuminating and other purposes, and
217 to have, own, hold, and maintain all pipes, property, and fixtures necessary for said purposes."

Some time thereafter the Dueber Light Company applied to the mayor and common council of Newport for permission to lay pipes in the streets of the city for the purpose of supplying gas to its citizens in manner aforesaid, which license was granted, and it is claimed that the city of Newport was proceeding to make a contract with the Dueber Light Co. to furnish gas to the city in disregard of its prior contract with the Newport Light Co. for the same purpose. There was an abortive effort to make a new contract with the Newport Light Co. Thereupon this litigation ensued. The Newport Light Co., in the action against the city of Newport, seeks to enjoin the city from making or executing such new contract.

The Dueber Light Co., in the action against the Newport Light Co., seeks to enjoin the latter from claiming or asserting any exclusive right or privilege to the use of the streets, alleys, or public places of the city of Newport for the purpose of laying down or maintaining pipes and other fixtures to supply gas to the citizens and inhabitants of said city for twenty-five years or any other time.

In this action the Newport Light Co. makes its answer a counterclaim against the plaintiff, Dueber Light Co., and a cross-petition against its codefendant, The City of Newport, and prays that the Dueber Light Co. be enjoined from laying any gas pipes, &c., in the streets, &c., of Newport, and that the city of Newport be enjoined from taking any steps toward conferring such power upon
218 said company, and that the city be further enjoined from making any contract with said company looking to that end or in violation of the rights of the Newport Light Company. It will thus be seen that the foundation of this controversy is the right to lay gas pipes in the streets and other public places of the city of Newport.

We will consider the legal rights of the parties separately, and when they are ascertained it will not be difficult to apply the remedy.

I.

What right has the Dueber Light Company to lay gas pipes in the streets of Newport? None whatever, in the opinion of the court. It is a corporation, as exhibited on the face of its pleading, created not by act of the legislature, but under the general incorporation laws of the State.

The General Statutes, chap. 56, under which this corporation was organized, expressly provides that "such incorporation shall confer no power or privilege not possessed by natural persons, except as therein provided." Nothing is thereinafter provided which takes such a corporation as the Dueber Light Co. from under the operation of that statutory requirement.

It is certain, then, that the act of incorporation did not and would not confer upon that company the right to lay gas pipe in the streets of Newport, for that is a right not possessed by any natural person.

The rights to lay gas pipes in the streets of a city is a franchise which can only be conferred through the sovereign power of
219 the State. The doctrine is thus stated by Dillon in his work on Municipal Corporations, 3rd ed., sec. 691.

In Great Britain express legislation is necessary to warrant the laying down of gas pipes in the public highways, and so in this country it is also considered that the right to the use of the public streets of a city by a gas company for the purposes of laying down its pipes is a franchise which can be granted only by the legislature or some *loyal* or municipal authority empowered to confer it." See also 18 O. Sh. Rep., 292.

It only remains to inquire whether the grant of the right to the Dueber Light Co. by the city of Newport, through its mayor and council, conferred any authority or had any efficacy. We think not. The act was void because the city of Newport had no power to make such grant; and, as we have just seen from Dillon, "no local or municipal authority" can create such a franchise until it has itself first been "empowered to confer it."

This brings us to consider the rights of the Newport Light Co.

II.

The only express power conferred upon the city of Newport by the legislature of Kentucky touching the matters in litigation was "to construct, maintain, and operate gas works, and to pass all ordinances necessary to regulate the same," which, of course, carried with it, under the well-known doctrine of reasonable implication, the implied authority to use the streets in laying pipe for that purpose.

220 It seems to be conceded that the city of Newport, having this power to construct and operate gas works and lay pipes for that purpose, could by proper contract employ some other person or corporation to do precisely the same thing, with the same power. This was done with the Newport Light Co., and when it was done the power of the city of Newport over the entire subject was exhausted.

It must be borne in mind that there was no "legislative discretion" given to the city of Newport to grant the franchise of the right to lay gas pipes in the streets to persons and corporations indiscriminately or generally.

The franchise was granted to the city of Newport to be exercised

by the city, and that by implication, and the only right which the city of Newport had it conferred by contract to the Newport Light Co.

We believe the rule is universal that the municipal authorities of a city cannot grant a franchise in the use of its streets for the purpose of laying or operating a street railway on the surface of the street without first having received express authority so to do from the State legislature. The tearing up of a street and laying gas pipe therein is much more inconsistent with the use to which the street was originally dedicated.

In Penn. R. R. Co. *vs.* Nat. R. R. Co., & C. E. Gr., 441, the New Jersey court of appeals says: "Whether franchise- are del-
221 gated by special charters or under general laws, they are emanations from the people in their sovereign capacity. What is not conferred is withheld and remains in the original source.

The attempt to exercise them by individuals or companies, until so conferred, can be nothing but an unwarranted usurpation of power. This doctrine is rooted and grounded in the common law we inherit, and equally so in public policy and public expediency."

In the celebrated and leading case of Bank of Augusta *vs.* Earle, 13 Peters, 519, the Supreme Court of the United States announces this rule in its broadest terms as applicable to every franchise. The court says: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State."

Assuming this to be the law, there are still two objections urged to the validity of the contract between the city of Newport and the Newport Light Co.:

First. That it creates a monopoly, and for that reason is against public policy and void.

Second. That it gives exclusive public privileges which are not in consideration of any public service, and is therefore interdicted by the 1st sec. of our "bill of rights," which provides that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services.

As to the first objection, we do not think it can be raised
222 in these actions, because there is no application to restrain the Dueber Light Co. from manufacturing or selling gas, but only to restrain it from laying pipes in the streets and from exercising a franchise which it does not possess.

The definitions of a monopoly given by Mr. Justice Field in the "slaughter-house cases" has become standard in this country. He defines it "to be an institution or allowance from the sovereign power of the State, by grant, commission, or otherwise, to any person or corporation for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before or hindered in their lawful trade."

It relates to the deprivation of rights common to all men before the legislative grant.

It is obvious that this cannot apply to a franchise, for, as we have seen, this is not a natural right. It is a right which no person or corporation has or can exercise, except as the power may be given through the General Assembly of the Commonwealth.

(2.) As to whether the Newport Light Company has an exclusive public privilege and whether such privilege was granted in consideration of public service to be rendered the city of Newport, consistently with the Constitution, so as to make it unlawful for the State legislature hereafter to grant a similar right to any
223 other person or corporation, it seems unnecessary now to decide.

In the view taken of the law by this court that contrast is valid and exclusive so far as the city of Newport is concerned, because it has exhausted its power over the subject, and it is also exclusive as to the Dueber Light Co., because it has no rights in the premises.

In fact it is exclusive to all the world until the legislature in its sovereign power may see fit to grant the same right to somebody else, if its power also has not been exhausted.

This exclusiveness grows out of the very nature of a franchise, being a right not pre-existent, but created and exercised only in pursuance of special legislative authority in each particular case.

As said by the learned vice-chancellor in the case of Jersey City Gas Co. *vs.* Dwight, 29 New Jersey Equity Reports, 249, "It must also be declared as the established law of this State that the grant of a franchise by the State is, by its own intrinsic force and without express words, exclusive against all persons but the State, and that any attempt to exercise like rights and privileges without legislative authority is a fraud and an unwarrantable usurpation of power."

In the same opinion the court says the complainants have a right to use the public highways of Jersey City for the purpose of carrying their gas by pipes to all who want it. The defendants have no such rights, but threaten to exercise it by usurpation and
224 thus acquire part of the complainants' business. In this condition of affairs I do not think there can be the slightest doubt as to the duty of the court. The right of a corporation to seek the protection of a court of equity against an infringement or usurpation of its franchise is a familiar rule of equity well established, and it is equally well established that a franchise is property, which, like every other thing susceptible of private ownership, is under the protection of the law."

It might be *obiter dictum* for this court now to determine whether the right of the Newport Light Co. is exclusive against the State. At any rate, it is not considered necessary and the court will not follow the learned counsel on both sides in their very able investigation of the conflicting authorities upon this subject. It will be time enough to determine that question when some corporation or person authorized by the State, according to the forms of the law, comes properly before the court to raise it.

As the court is now advised, the Dueber Light Co. has no rights

in the premises and has therefore no standing in court and is entitled to no relief.

The Newport Light Co. is entitled to an injunction as prayed, both against the Dueber Light Co. and the city of Newport.

The demurrer of the Dueber Light Co. to the answer, counterclaim, and cross-petition of the Newport Light Co. is overruled. The demurrer of the Newport Light Co. to the petition of the Dueber Light Co. is sustained. Let exceptions be entered for both parties.

225 The injunction against the city of Newport is made perpetual—in the suit of the Newport Light Co. against the city of Newport. The other action was only submitted on the demurrers.

Mess. Carlisle & Carlisle & Nelson & Washington, attorneys for Newport Light Co.

Mess. Wm. Lindsay, T. F. Hallam, Jos. C. Wright, attorneys for Dueber Light Co.

E. W. Hawkins, attorney for the city of Newport.

And at a court held for the court aforesaid on the 18th day of July, 1885—

On motion of the Dueber Light Company, by counsel, it is ordered that the order entered herein on the 13th inst. be, and the same is now, set aside and held for nought.

And the court, being now sufficiently advised, delivered a written opinion herein, which was ordered to be and now is filed herein.

Said opinion of the court is the one copied into this record
226 on page 42.

And at a court held for the court aforesaid on the same day, to wit, the 18th day of July, 1885—

The court being now sufficiently advised, it is considered and ordered that the demurrer of the plaintiff to the answer, counterclaim, and cross-petition of the Newport Light Company is overruled, to which the plaintiff excepts, and stands on its demurrer, and the demurrer of the Newport Light Company to the petition is sustained, to which the plaintiff excepts, and the plaintiff declines to amend its petition, and it is thereupon adjudged that the petition of plaintiff, The Dueber Light Company, be and is dismissed, and it is further considered and adjudged that the defendant recover of plaintiff their costs herein expended and may have execution therefor, to which plaintiff excepts, and, on its motion — the court determine the amount in controversy with a view to appeal, the court determines the amount in controversy is more than $3,000.00, and the plaintiff prayed an appeal to the court of appeals, which is granted.

And the plaintiff stood on its demurrer to the answer, counterclaim, and cross-petition of the Newport Light Company in said cause and declined to reply or answer, and thereupon it is adjudged that the defendant to the cross-petition herein, The City of Newport, is perpetually enjoined and restrained from taking any further steps

or proceedings whatever with a view or for the purpose of
227 conferring upon the plaintiff, The Dueber Light Company, any rights, privileges, or authority of laying pipes in the streets, lanes, alleys, commons, or public places in said city and to the inhabitants thereof and from making any contract or agreement with the Dueber Light Company looking to that end during the existence of the contract between the said city and the Newport Light Company; and it is further considered and adjudged by the court that the plaintiff, The Dueber Light Company, be, and is hereby, perpetually enjoined and restrained from laying down or attempting to lay down in the streets, lanes, commons, and public places in the city of Newport pipes or other fixtures for the purpose of furnishing gas to said city or to private consumers resident therein for illuminating purposes, and from digging or making any excavations in any of said places with a view of laying pipes therein for that purpose.

It is further considered and adjudged that the defendants recover of the plaintiff their costs in this behalf expended and may have execution therefor.

To all of which the plaintiff, The Dueber Light Company and The City of Newport, except, and, on their motion that the court determine the amount in controversy with a view to appeal, the court determines that the amount in controversy is more than $3,000.00, and the plaintiff and the defendant, The City of Newport, prayed an appeal to the court of appeals, which is granted.

And on the 27th day of July, 1885, came the City of
228 Newport and the Dueber Light Company, by counsel, and filed in the office of the clerk of said court their schedule herein in words and figures as follows, to wit:

The clerk will copy for the City of Newport and the Dueber Light Company, for their appeal, the entire record in the above cause.

HALLAM & MYERS,
J. C. WRIGHT,
E. W. HAWKINS,
WM. LINDSAY, *Attorneys.*

COMMONWEALTH OF KENTUCKY, }
Louisville Chancery Court, } *sct:*

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, do certify that the within and foregoing 62 pages, this included, contains a full, true, and correct transcript of the record and proceedings had in said last-named court in an action lately pending therein, wherein The Dueber Light Company was plaintiff and The Newport Light Company was defendant, as appears of record in my office, said action being numbered 1606.

Witness my hand this 28th day of July, 1885.

JNO. H. WELLER,
Clk Lou. Ch'y C't & ex Officio Clk Lou. Law & Equity C't.

229 Upon which is endorsed the following statement:

September Term, 1885.

THE DUEBER LIGHT COMPANY and THE CITY OF NEWPORT, Appellants,
against
THE NEWPORT LIGHT COMPANY, Appellee.
} Statement.

Appeal from the Louisville law and equity court.

The judgment appealed from was rendered July 18, 1885, and will be found on page 59 of this record.
Appeal granted below.
No process required.
E. W. Hawkins and Hallam & Myers, for appellant.

On the same day, August 17, 1885, the appellant The City of Newport, by counsel, filed in the office of said clerk of the Kentucky court of appeals a transcript in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY,
Louisville Law and Equity Court, } *set:*

Pleas before the Honorable John G. Simrall, judge of the Louisville law and equity court, held at the court-house, in the city of Louisville, on the — day of July, 1885.

THE NEWPORT LIGHT COMPANY, Plaintiff,
vs.
THE CITY OF NEWPORT, Defendant.

230 Be it remembered that heretofore, to wit, on the 13th day of May, 1885, came the clerk of the Campbell chancery court and filed in the office of the clerk of the aforesaid court the transcript and papers herein.
Said transcript being in words and figures as follows, to wit:

STATE OF KENTUCKY:

Campbell Chancery Court, Special March Term, March 13th, 1885, at Newport.

Honl. J. W. Menzies, chancellor.

NEWPORT LIGHT COMPANY, Plaintiff,
vs.
CITY OF NEWPORT, Defendant.
} No. 2793. Orders.

Came defendant and moved the court to dissolve the injunction herein u-on the whole case. On motion of defendant the general demurrer to plaintiff's petition filed in vacation March 2nd, 1885, and the answer filed in vacation March 2nd, 188–, and Exhibits "A," "B," "C," "D," and "E" thereto filed in vacation March 3rd,

1885, and the notice filed in vacation March 3rd, 1885, are each noted of record; came plaintiff and filed demurrer and reply, together with Exhibits 1 to 9, inclusive, and defendant demurred to said reply. The court being sufficiently advised, the injunction herein is dissolved, but this order is not to take effect for twenty days; meanwhile plaintiff has leave to apply for the reinstatement of the injunction.

And thereafter, at the regular May term of the Campbell chancery court, on the 6th day of May, 1885, the following order
231 was made, to wit:

On motion of defendant the demurrer to plaintiff's petition and the answer filed in vacation are noted of record. Came defendant and moved the court to submit this cause, and plaintiff objects, and on motion of plaintiff the reply filed in vacation is noted of record.

And on the same day, to wit, May 6th, 1885, the following order was made, to wit:

By consent this cause is submitted and transferred to the Louisville law and equity court, to be tried by Judge Simrall.

STATE OF KENTUCKY, }
Campbell Chancery Court, } *set:*

I, John C. Schroll, clerk of the chancery court for the county aforesaid, do hereby certify that the foregoing two pages of written matter contain a full, true, and correct transcript of the orders made in said court in the within-styled action as the same appear of record in said court.

In witness whereof I hereunto set my hand as clerk aforesaid this 11th day of May, 1885.

JOHN C. SCHROLL, *Clk,*
By A. L. RENSCHER, *D. C.*

Memorandum of Papers and Pleadings in the Within-styled Cause, No. 2793.

Original petition No. 2793 filed Feb'y 19, '85.
Exhibits "A," "B," "C," & "D" to petition filed Feb'y 19, '85.
232 Injunction bond filed Feb'y 19th, '85.
Summons to Campbell Co. issued Feb'y 19, '85.
Order of injunction to Campbell Co. issued Feb'y 19, '85.
Gen'l demurrer filed March 2, '85.
Answer filed March 2nd, 1885.
Exhibits "A," "B," "C," "D," & "E" to answer filed March 3, '85.
Notice filed March 3rd, '85.
Demurrer and reply filed M'ch 13, '85.
Exhibits No. 1 to 19, inclusive, to reply filed March 13, '85.
Order of reinstatement of injunction filed March 20, '85.
Affidavit of John A Williamson filed May 6th, 1885.
Transcript and orders from Campbell chancery court.
Steps in case.

Taxation of costs.

The said original petition so filed is in words and figures as follows, to wit:

The plaintiff says that it is a body corporate and politic under the laws of this State, with power, among other things, to sue and be sued, contract and be contracted with, and to furnish any city, town, district, corporation, public institution, manufacturing establishment, or private premises with gas or other light for such time and upon such terms as may be agreed upon by the parties, and also for the purposes of said business to acquire, by purchase or other lawful mode, such property, real or personal, as it might require in its business and to dispose thereof.

233 It says that the defendant is a municipal corporation under the laws of this State, and with authority under its charter to provide for the lighting of its streets, lanes, alleys, commons, and public buildings or places with gas; that in virtue thereof the defendant on the 3rd day of June, 1880, made and entered into a contract with plaintiff, whereby it was mutually stipulated, covenanted, and agreed, among other things not material to be here noticed, that from and after the 11th day of June, 1882, that plaintiff and its successors should have the exclusive privilege of using any or all of the streets, lanes, commons, alleys, and public places of said city for the purpose of laying pipes to convey and supply gas to it and others, said privilege to be so enjoyed and used for the term of twenty-five years from June 11th, 1882, and until the defendant should give plaintiff twelve months' notice to terminate same, and expressly embracing the right of plaintiff to use said streets, lanes, alleys, and public places or grounds for establishing and conducting said business; that plaintiff should furnish to defendant upon its several streets, lanes, alleys, and public places in which pipes were so laid a continuous supply of gas equal in quality to Cincinnati gas in such quantities as defendant might require and direct for the use of the public street lamps and public buildings owned by it or ordered by the board of councilmen at the rate of one and $\frac{20}{100}$ dollars per one thousand cubic feet; that said board of councilmen should determine what sized burners should be used, so that they should not burn less than four feet to

234 the hour for each, the lighting of same to be regulated in such manner as might from time to time be directed by said board of councilmen; that the amount of gas consumed by said street lamps and public buildings owned by defendant should be ascertained by the customary meter measurement; that gas should be furnished to the citizens of defendant city for their private consumption at rates as follows, to wit: At $1.90 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1887; at $1.75 per thousand feet, with five per cent. off for cash within ten days, for the period of fifteen years from June 11th, 1892; that all public street lamps, lamp posts, and other requisite fixtures appertaining thereto should be

furnished by and at the expense of plaintiff and erected at such times, points, and in such numbers, where the main pipes were laid, as the defendant might direct; that the same should be lighted upon their erection and continued in use thereafter as in said contract provided; that when defendant should determine that a gas post should be removed from one point to another or be discontinued the plaintiff should remove the same at defendant's expense for such removal, and, if discontinued, the same, including requisite fixtures for the lamp post, should be purchased by defendant at their original cost: that public street lamp- should be cleaned, lighted, and kept in repair at defendant's expense, and if de-
235 fendant should at any time desire to have public street lamps erected at any of the public buildings or to light any street, lane, alley, etc., and plaintiff should refuse to extend *their* pipes to such points in defendant city, then the latter should have the privilege of extending said pipes at its own cost and to order the erection of such number of public street lamps for the purpose aforesaid as it might deem proper, the same to be erected upon the same conditions and furnished with gas upon the same terms as the other public street lamps of the city, the main gas pipes so laid down not to be used, directly or indirectly, for furnishing gas except for public street uses, nor other pipes to be laid down along an*d* part of the streets so occupied by gas pipes laid down at the defendant's expense, until the whole amount expended by defendant in laying down said pipes be refunded to defendant by plaintiff and its successors, when the said pipes should become the property of plaintiff; provided that plaintiff, if required or ordered so to do by defendant's said board of councilmen, should lay down on such streets or street as said board might designate not less than one thousand feet of main gas pipe annually; that inasmuch as the then existing contract between the defendant and the Covington Gas Light Company would expire on the 11th day of June, 1882, and that by the terms of the same the city council of defendant or those with whom they might contract to light defendant city thereafter might purchase the pipes, lamp posts, fixtures, &c., of said Covington Gas Light Company in defendant city, in accordance with a resolution thereof, to be determined as provided in a cer-
236 tain ordinance bearing date the 11th day of June, 1857, entitled an ordinance providing for the lighting of the city of Newport, Kentucky, with gas, therefore, in consideration of the undertakings of plaintiff in said contract of June 3rd, 1880, the said right of purchase, with all privileges incident or relating thereto, were by defendant in its said contract assigned, transferred, and vested in plaintiff in as full a manner as they belonged to defendant, the latter therein guaranteeing to plaintiff the accomplishment of said purchase and transfer, and the plaintiff, in consideration thereof, therein binding itself to make said purchase as aforesaid and to light the defendant city thereafter according to the stipulations and provisions of said contract; that plaintiff and its successors reserved and should have the right upon the expiration of said contract to remove any or all of its pipes, lamp posts, fixtures, &c.,

unless said contract should be renewed, or defendant might purchase said pipes, lamp posts, fixtures, &c., the value thereof to be ascertained by five disinterested persons, resident of Kentucky, two of whom should be chosen by defendant, two by plaintiff, and the fifth by the four so chosen; that for the gas consumed by it in the public lamps, public buildings, and elsewhere, as the quantity might — ascertained from the meters each month, the defendant should pay cash to the plaintiff; and, finally, that plaintiff should within fourteen days from the date aforesaid, to wit, June 3rd, 1880, signify in writing its acceptance of said contract, whereupon the same should "become a binding contract" between plaintiff
237 and defendant, it being further provided that within twenty days from said date plaintiff should execute bond, with good and approved security, to defendant for the faithful performance of all its duties as in said contract enjoined and stipulated and for a strict compliance by plaintiff with all the terms, conditions, and requirements of same.

And plaintiff says that said contract, according to the tenor and effect aforesaid, was embodied and embraced in an ordinance duly and regularly passed by the mayor and board of councilmen of defendant on the date aforesaid, which by its terms took effect from its passage. A true copy of said ordinance, entitled "An ordinance further providing for the lighting of the city of Newport, Ky.," is herewith filed and made a part hereof, marked Exhibit "A."

Plaintiff says that within fourteen days from and after the passage thereof as aforesaid it signified in writing its acceptance of said contract as provided therein, and that within twenty days from and after said date it executed and delivered to defendant its bond, with good and approved security, for the faithful performance of all and singular its duties under said contract as therein enjoined and for the strict compliance of all its terms, conditions, and requirements thereof, which bond was duly accepted by defendant; and plaintiff says that thereafter, to wit, upon the — day of ——, 188–, it entered in good faith and with all proper diligence upon the performance of all and singular its duties under said contract according to the terms and conditions thereof; that in so doing it has nec-
238 essarily made great and burdensome outlays and expenditures in money and material, amounting, in the aggregate, to more than one hundred thousand dollars; that it has likewise and of necessity expended great labor and been put to much trouble and pains in the due and proper performance of its several covenant- aforesaid; that, relying thereupon, it has, in the utmost good faith and in the determination to fully perform its said undertakings, purchased from said Covington Gas Light Company, as provided in said contract, its pipes, lamp posts, fixtures, etc., at great expense, to wit, in the sum of nearly sixty thousand dollars; that its additions thereto under said contract have been made at a cost of more than forty thousand dollars; that these large sums have been necessarily expended under said contract and in reliance thereupon by plaintiff, as defendant well knew at the time thereof, and with its approval; that it has ever since duly and regularly proceeded

with defendant's knowledge and consent in the execution of said contract, and has at all times furnished defendant with gas, as therein provided; that it is still ready, willing, and able to furnish same to defendant in such quantities as it may require and in all respects to further perform and execute said contract in all its requirements, of all which defendant has full knowledge: but plaintiff says that the defendant, wholly ignoring and disregarding the provisions of its said contract, and for the purpose of annoying and harrassing plaintiff, has recently been and still is making attempts to enter into a similar contract with other persons and com-
239 panies, against the protest of this plaintiff; that to this end, on or about the — day of January, 1885, pursuant to a resolution of its board of councilmen, it advertised for proposals for the lighting of its public highways, &c., for the term of — years from the 8th February, 1885, "or as soon thereafter as the same can be done." A copy of said resolution is herewith filed as part hereof, marked Exhibit "B."

Plaintiff says that on the 6th day of February, 1885, pursuant to a resolution passed by the city council of defendant on the preceding day, it was notified by defendant's committee on gas and its official attorney that its contract with defendant was at an end on the 8th day of February, 1885. Said resolution and notice are herewith filed, marked Exhibit "C." And plaintiff says that on the 10th day of February, 1885, pursuant to a resolution passed by the board of councilmen of the defendant on the preceding day, it was notified by defendant that, among other things, there was, in the judgment of said board, no existing contract between plaintiff and defendant for the furnishing of gas for lighting the streets, lanes, alleys, &c., or public places of defendant city; that the defendant had not directed or required the furnishing the supply of gas for that purpose, and "does not now do so with any reference to any pre-existing contract, and that for any gas which may hereafter be furnished it may be done without reference to any former contract, and which either party is at liberty to discontinue at their option without notice."

Said resolution and notice are herewith filed, marked Exhibit "D."

240 And plaintiff says that thereupon it notified defendant that it relied upon its contract aforesaid and would continue to furnish gas, etc., as it was then doing under and pursuant to said contract and not otherwise; that the defendant nevertheless, still disregarding its said contract and determined with *pirpose* aforesaid and in bad faith to violate same, has continued and still is continuing its efforts to make a contract with other persons for the lighting of its streets, lanes, alleys, and public places, and is threatening to do so at the next meeting of its board of councilmen; that *of* that end its arrangements are either perfected or are being perfected for the final consummation thereof at its next meeting as aforesaid, and that unless restrained and inhibited from so doing the defendant will speedily, in bad faith and in violation of the terms and meaning of said contract, make a new contract with some

other person, company, or corporation for the lighting of its streets, etc., as aforesaid; that it is likewise defendant's purpose to discontinue the taking of gas from the plaintiff and to take gas from other parties, as well as to grant the latter the priv-lege of furnishing same to private consumers; that by reason thereof plaintiff will be made to suffer great and irremediable loss and injury.

Wherefore plaintiff prays that an order of injunction issue, directed to the defendant, its officers and agents, and to said board of councilmen, strictly enjoining and restraining them and each of them from making any contract with any person, company, partnership, or corporation for the lighting of defendant's streets,
241 lanes, alleys, or public places, and from discontinuing the taking of gas from plaintiff for the lighting of said places in such quantities as it may require, and for all such further relief as plaintiff may be in equity entitled to.

NELSON & WASHINGTON,
Att'ys for Plaintiff.

John A. Williamson says that he is the president of The Newport Light Company, plaintiff in the foregoing petition; that the statements therein contained are true as he verily believes; that the injunction therein prayed for has not been refused by the court or by any circuit judge, and that irreparable injury will result to said plaintiff company if said injunction be not immediately granted.

JOHN A. WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson, president of the Newport Light Company, this 19th day of February, 1885.

JOHN C. SCHROLL, *Clk.*

STATE OF KENTUCKY, } *set:*
Campbell County, }

To the City of Newport, its officers, agents, &c.:

You are hereby enjoined and restrained from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the city of Newport with gas or otherwise and from discontinuing the taking of gas from the Newport Light
242 Company for the lighting of said places in such quantities as may be required for that purpose until the further orders of this court.

Given under my hand this 19th day of February, 1885.

JOHN C. SCHROLL,
Clerk Campbell Chancery Court.

The exhibit marked "A" and filed with said transcript is in words and figures as follows, to wit:

Passed June 3rd, 1880.

An ordinance further providing for the lighting of the city of Newport, Ky.

SECTION 1. Be it ordained by the mayor and board of councilmen, of the city of Newport, That from and after the passage of this ordinance there shall be and is hereby granted unto the Newport Light Company and their successors, the exclusive privilege of using any or all of the streets, lanes, commons, alleys and public places of the city *of* for the purpose of laying pipes to convey and supply gas to the said city of Newport and others, this privilege is granted for the term of twenty-five years from the date hereof, and until the city shall give said company twelve (12) months' notice to terminate the same and embraces the right of said company to use said streets, lanes, alleys and public grounds for establishing and conducting said business.

SECTION 2. That the said pipes &c., shall be so placed as not to interfere with the water, drain or sewer pipes of said city and
243 whenever said light company or their successors shall desire to open any of said streets, lanes, alleys, etc. for the purpose of laying down pipes it shall be their duty to give at least five days' notice to the city previous to the commencement of the work. The company shall not during the progress of the work unnecessarily obstruct public travel, and shall within a reasonable time not exceed- thirty days after the pipes are laid in the streets etc. repair said streets in such manner as may be satisfactory to the city where the same have been disturbed by such work of the company, and that in case of settlement of said streets within sixty days thereafter, the said Newport Light Company shall repave and put the streets in the same condition as before disturbed.

SECTION 3. The Newport Light Company shall furnish to the city of Newport upon the several streets, lanes, alleys and public places of the city of Newport in which pipes are laid, a continuous supply of gas (equal in quality to Cincinnati gas) in such quantities as the said city may require, and direct for the use of the public street lamps and public buildings owned by the city or ordered by the board of councilmen at the rate of $1.20 per one thousand cubic feet, said board of councilmen shall determine what size burners shall be used so that they shall not burn less than four feet to the hour for each, and the lighting thereof shall be regulated in such manner as may from time to time be directed by the board of council- of the city of Newport.

The amount of gas consumed by public street lamps and in public buildings owned by the city to be ascertained by the
244 customary meter measurement, gas shall be furnished to the citizens for their private consumption at the following rates, viz: At $1.90 per thousand cubic feet with 5 per cent. off for cash within ten days, for the period of five years from June 11th 1882; *8* at $1.80 per thousand cubic feet with 5 per cent. off for cash within ten days for the period of five years from June 11th 1887, at $1.75

per thousand cubic feet with five per cent. off for cash within ten days for the period of fifteen years from June 11th 1892.

SECTION 4. That all public street lamps, lamp posts, and other requisite fixtures appurtaining thereto shall be furnished by and at the expense of said Newport Light Company and erected at such times, points, and in such numbers (where the main pipes are laid) as the city may direct, said lamps to be lighted upon their erection and continued in use thereafter as herein provided, and whenever the said city shall determine that a gas post shall be removed from one point to another or be discontinued, the said Newport Light Company shall remove the same at the expense of said city for such removal, and if discontinued, the same including requisite fixtures for the lamp post shall be purchased by said city at their original cost.

Public street lamps to be cleaned, lighted and kept in repair at the expense of said city and if said city should at any time desire to have public street lamps erected at any of the public buildings, or to light any street, lane, alley, etc. and the said Newport
245 Light Company should refuse to extend the pipes to such situations in the city, then the said city shall have the privilege of extending the pipes at their own cost, and to order the erection of such number of public street lamps for the purpose aforesaid, as they may deem proper and the said public street lamps shall be erected upon the same conditions and furnished with gas upon the same terms as the other public street lamps of the city, and the main gas pipes so laid down shall not directly or indirectly be used for furnishing gas except for public street uses, nor shall other pipes be laid down at the expense of the city until the whole amount so expended by the city in laying down pipes be refunded to the city by said Newport Light Company and their successors, when the said pipes shall become the property of the said Newport Light Company, provided that the said company, if required or ordered so to do by said board of councilmen, shall lay down on such street or streets as said board may designate not less than one thousand feet of main gas pipe annually.

SECTION 5. And whereas the existing contract of the city of Newport with the Covington Gas Light Company will expire on the 11th day of June, 1882, and by the terms of said contract the city council or those with whom they may contract to light the city thereafter, may purchase the pipes, lamp posts etc. of the Covington Gas Light Company, in the city, the value of the same to be determined as provided in the ordinance of June 11th, 1857, entitled An ordinance providing for the lighting of the city of Newport, Ky., with gas. Now, therefore, in consideration of the undertakings of the said Newport Light Company, as stip-
246 ulated in this ordinance, the said right of purchase with all the privileges incident or relating thereto *are* hereby assigned, transferred and vested in said Newport Light Company in as full a manner as the same belong to the city of Newport, and the city of Newport hereby guarantees to said Newport Light Company the accomplishment of said purchase and transfer, and the said

company hereby binds itself in consideration of said transfer to make said purchase as aforesaid and the said Newport Light Company is to light the city thereafter according to the stipulations and provisions of this ordinance.

SECTION 6. The Newport Light Company and their successors reserve and shall have the right to remove any or all the pipes and lamp posts, fixtures etc. when this contract expires unless the same shall be renewed, or the said city may purchase said pipes, lamp posts, fixtures, etc. the value of the same to be ascertained by five disinterested persons residents of Kentucky two of whom shall be chosen by the city, two by the said Newport Company, and the fifth one by the four so chosen.

SECTION 7. Said company or their successors may adopt any other mode equal to gas for supplying light to the city and its inhabitants etc. provided the same shall be done at no greater cost or expense to the city or consumers than the gas-light.

SECTION 8. The city is to pay in cash to said company for the gas consumed by it in the public lamps, public buildings
247 and elsewhere as the quantity may be ascertained from the meters each month.

SECTION 9. The said Newport Light Company shall within fourteen days after the passage of this ordinance signify in writing its acceptance and thereupon the same shall become a binding contract between said company and the city, but upon failure of the company to accept the same then this ordinance may be repealed, provided further that said company shall within twenty days after the passage of this ordinance execute bond with good and approved surety to said city for the faithful performance of all its duties as herein enjoined, and the strict compliance with all the terms, conditions and requirements of this ordinance.

This ordinance shall take effect from its passage.

And the Exhibit "B" filed with said transcript is in words and figures as follows, to wit:

Resolved, *the* the city clerk be instructed to advertise for proposals for lighting of the public highways of the city of Newport with gas or electricity from dark till daylight, not observing the moonlight schedule, for the term of — years from February 8th, 1885, or as soon thereafter as the same can be done.

The city reserving the right to reject any or all bids.

The parties bidding to give bond for the faithful performance of contract.

Said bids to be presented on or before the next regular
248 meeting.

And the said Exhibit "C" filed with said transcript, is in words and figures as follows, to wit:

NEWPORT, KY., *Feb.* 6, 1885.

To the Newport Light Company, Newport, Ky.:

At a meeting of the city council of the city of Newport, held at the council chamber on the 5th day of February, A. D. 1885, the following re-olution was adopted, to wit:

"Be it resolved, That the committee on gas and the city attorney be, and *is* hereby, authorized to notify the Newport Light Company that its contract with the city of Newport is at an end on February 8th, 1885, and to ascertain at how much per 1,000 cubic feet they will furnish the city with gas (meter measurement) for a period of ninety days after February 8th, 1885."

To which resolution the undersigned committee appointed therein calls the special attention and notice of the Newport Light Company.

One of the objects of the resolution being "to ascertain at how much per 1,000 cubic feet the Newport Light Company will furnish the city with gas (meter measurement) for a period of ninety days after February 8th, 1885, the committee request the light company to give them the desired information so that it may be reported to the council on Monday evening next.

249 Respectfully, A. C. BREITH.
J. WAHLFAHERT.
C. O. SIMRICK.
E. W. HAWKINS, *City Att'y.*

And the exhibit marked "D" and filed with the said transcript is in words and figures as follows, to wit:

City of Newport, city clerk's office. W. F. McClure.

NEWPORT, KY., *February* 10, 1885.

Newport Light Company, John A. Williamson, president.

DEAR SIR: By order of the board of councilmen of this city you are herewith handed a copy of a resoultion adopted by said board at a meeting held last night, to wit:

Resolved, That there is not now, in the judgment of this council, any "existing contract" between the city of Newport and the Newport Light Company for the furnishing of gas for lighting the streets, lanes, alleys, or public places of this city; that the city has not directed or required the furnishing the supply of gas for that purpose and does not now do so with any reference to any pre-existing contract, and for any gas which hereafter may be furnished it may be done without reference to any further contract and which either party is at liberty to discontinue at their option without notice.

Very respectfully, W. F. McCLURE,
250 *City Clerk.*

And the injunction bond of February 19th, 1885, filed with the said transcript is in words and figures as follows to wit:

Campbell Chancery Court.

We undertake that the plaintiff, The Newport Light Company, shall pay to the defendant, The City of Newport, the damages which city of Newport may sustain by reason of the injunction in this

action if it be finally decided that said injunction ought not to have been granted.

Witness our hands this 19th day of February, 1885.

JOHN A. WILLIAMSON.

Attest: JOHN C. SCHROLL, *Clk*,
By A. L. REUSCHER, *D. C.*

And the sheriff's return on the summons issued on the 19th day of February, 1885, upon the petition and directed to the sheriff of Campbell county is in words and figures as follows, to wit:

Executed the within process this 19th day of February, 1885, on the City of Newport by delivering a copy hereof to James C. Wright, mayor of said city, he being the highest officer of said city found in my county.

F. REICHMAN,
Sheriff C. C.

And the said order of injunction issued on the 19th day of February, 1885, and directed to the sheriff of Campbell county
251 was returned by said sheriff in words and figures as follows, to wit:

Executed the within order of injunction on the City of Newport by delivering a copy hereof to James C. Wright, mayor of said city, he being the highest officer of said city found in my county, this 19th day of February, 1885.

F. REICHMAN,
Sheriff C. C.

And the general demurrer filed on March 2nd, 1885, and returned with said transcript is in words and figures as follows, to wit:

Now comes the defendant, The City of Newport, and demurs generally to plaintiff's petition because, as defendant says, the said petition does not state facts sufficient to constitute a cause of action.

E. W. HAWKINS,
Att'y for Defendant.

And the said answer of the defendant filed same day is in words and figures as follows, to wit;

The defendant, The City of Newport, waiving none of its objections to the many errors and imperfections in plaintiff's petition contained, but still relying and insisting upon its general demurrer to plaintiff's said petition, for answer thereto states that long after the said alleged contract in plaintiff's petition mentioned was signed, to wit, on the 10th day of January, 1884, the said defendant, through its city council and at a regular meeting, adopted the following resolution, to wit:

252 "Resolved, That the city clerk be, and is hereby, directed to advertise for bids for lighting the public lamps of the city for the year ending February 1st, 1885, bids for same to be received at our next regular meeting."

A copy of said resolution is herewith filed and made a part hereof, marked Exhibit "A."

Defendant further states that afterwards, to wit, on the 24th day of January, 1884, the same being the next regular meeting of said city council after the said 10th day of January, 1884, the said city council did regularly meet in accordance with the provisions of its charter and ordinances; that at said time certain bids in response to said resolution as of the 10th of January, 1884, were presented for lighting and extinguishing the public lamps of the said defendant for the year ending February 1st, 1885; that among said bids was the bid of the plaintiff and which is in words and figures as follows, to wit:

NEWPORT, *January 24th*, 1884.

To the hon. mayor and board of councilmen of the city of Newport.

GENTLEMEN: The Newport Light Company will furnish the gas-light, extinguish and clean the public gas lamps of the city, keep the posts, lamp *lamp* frames, service cocks, burners, tips, &c., in thorough repair and order, guaranteeing the city against any and all expense of any kind or description, four-feet burners to be used and moonlight schedule to be adopted, for the sum of $20.25 per light per annum.

NEWPORT LIGHT COMPANY.
L. R. HAWKINS, *Sec'y.*

253 A copy of said bid is herewith filed and made a part hereof, marked Exhibit "B."

Defendant further states that at the aforesaid time, to wit, January 24th, 1884, the plaintiff's said bid, together with others, upon motion, was regularly referred to the committee of said city council on gas, according to the provisions of said city's charter and ordinances, to wit, by a majority vote of the council upon a call of the yeas and nays; that the said committee, by the aforesaid resolution, were instructed to examine into and report back to the board if there could not be devised some more satisfactory plan of lighting and caring for the public lamps of the city, etc. A copy of said resolution referring said bids to said committee is herewith filed and made part hereof, marked Exhibit "C."

Defendant further states that afterwards, to wit, on the 21st day of February, 1884, and upon the next regular meeting of said city council the aforesaid committee on gas did make a report, which is in substance as follows:

FEBRUARY 21ST, 1884.

The committee on gas, to whom was referred the various proposals for the lighting, extinguishing, and care of the public gas lamps of the city, beg leave to report that they have examined the same, etc., and, in view of the unsatisfactory results of the past, recommend *recommend* that the proposition of the Newport Light Company to keep the posts, lamps, lamp frames, services cocks, burners, tips, &c., in thorough repair and order, guaranteeing the

city against any and all expenses or outlay of any kind dur-
254 ing their contract, for the sum of $20.25 per light per annum, be accepted, with the understanding that whenever it shall appear from proper examination that an average of ten lights per night for a period of a week are not burning from any cause within the control of said light company it shall be charged with cost of the loss sustainad by the city, the same to be ascertained by an average with the contract price. Copy of said report is herewith filed and made part hereof, marked Exhibit "D."

Defendant further says that at the said time, to wit, February 21st, 1884, during the said regular meeting, the aforesaid report was, according to the defendant's charter and ordinances, regularly adopted, to wit, by a majority vote of the members of said council, upon a call of the yeas and nays. A copy of said resolution adopting the said report is herewith filed and made a part hereof, marked Exhibit "E."

Defendant further states that at and during said regular meeting on the said 21st day of February, 1884, a motion that the contract be awarded to the Newport Light Company, as recommended by the committee, was also adopted by the defendant through said city council in the mode prescribed by its said charter and ordinances, to wit, by a majority vote of the said board of councilmen upon the call of yeas and nays.

A copy of said motion and its adoption is herewith filed and made part hereof, marked Exhibit "F." Defendant further states that if there ever was a valid contract existing between the plaintiff and defendant before the 21st day of February, 1884, which defendant denies, the same has been superseded by that adopted
255 by defendant on the 21st day of February, 1884, and defendant states that the plaintiff, The Newport Light Company, immediately after the 21st day of February, 1884, accepted each and all of the provisions of said charter as set out in the report of the said committee on gas; that immediately thereafter they began acting under the same, and have been continuously doing so ever since, until February 8th, 1885; that said contract, as set forth in said report, was to continue for one year only, and that said year has long since past.

Wherefore defendant prays to be dismissed and for all further proper relief.

E. W. HAWKINS,
Att'y for Defendant.

The Exhibit "A" filed with the foregoing answer is in words and figures as follows, to wit:

NEWPORT, KY., *January 10th*, 1884.

Resolved, That the city clerk be, and is hereby, directed to advertise for bids for lighting the public lamps of the city for the year ending February 1st, 1885, bids for same to be received at our next regular meeting.

Exhibit "B" filed with said answer is in words and figures as follows, to wit:

NEWPORT, KY., *January 24th*, 1884.

To the honorable mayor and board of councilmen of the city of Newport.

GENTLEMEN: The Newport Light Company — the gas,
256 light, extinguish, and clean the public gas lamps of the city, keep the posts, lamps, tips, &c., in thorough repair and order, guaranteeing the city against any and all expense or outlay of any kind or description.

Four-foot burners to be used and moonlight schedule to be adopted for the sum of $20.25 per light per annum.

NEWPORT LIGHT COMPANY.
L. R. HAWTHORN, *Sec'y.*

And Exhibit "C" filed with said answer is in words and figures as follows, to wit:

JAN'Y 24, 1884.

Mr. Halloran moved that the bids be referred to the committee on gas, for them to examine into and report back to the board if there could not be devised some more satisfactory plan of lighting and caring for the public lamps of the city, so that the city could have the light for which she is now paying, and *from* which she is not getting by the present manner, but only a portion, for which she is paying.

On call of the yeas and nays, the question to refer to the committee on gas was adopted as follows:

Yeas—Cottingham, Gregel, Halloran, McLane, Moore, Tippenhauer, Wall—7.

Nays—Limrick, Weidner, Weingartner, Winkler, Wolfhart—5.

And Exhibit "D" filed with said answer is in words and figures as follows, to wit:

FEB'Y 21, 1884.

The committee on gas, to whom was referred the various
257 proposals for lighting, extinguishing, and care of the public gas lamps of the city, beg leave to report that they have examined the same and have investigated the manner in which this service has been heretofore performed and the expense it has been to the city, and, in view of the unsatisfactory results of the past, recommend that the proposition of the Newport Light Company to keep the posts, lamps, lamp frames, service cocks, burners, tips, &c., in thorough repair and order, guaranteeing the city against any and all expense or outlay of any kind during their contract, for the sum of ($20.25) twenty dollars and twenty-five cents per light per annum, be accepted, with the understanding that whenever it shall appear from proper examination that an average of ten lights per night for a period of a week are not burning from any cause within the control of said light company it shall be charged with costs of the loss sustained by the city, the same to be ascertained by an average with the contract price.

The Exhibit "F" filed with said answer is in words and figures as follows, to wit:

FEB'Y 21, 1884.

Mr. Halloran moved the contract be awarded to the Newport Light Company, as recommended by the committee, which was adopted on call of the yeas and nays as follows:

Yeas—Cottingham, Gregel, Halloran, McLane, Tippenhauer, Wohlfahrt—7.

Nays—Limrick, Wall, Weidner, Weingartner, Winkler—5.

258 And the notice filed March 3rd, 1885, and transferred with said transcript is in words and figures as follows, to wit:

The Newport Light Company will please take notice that the defendant in the above-entitled cause has, on the 2nd day of March, 1885, in the Campbell circuit court clerk's office, duly filed its answer and demurrer to plaintiff's petition.

Plaintiff will further take notice that the said defendant will, on the 13th day of March, 1885, between the hours of ten a. m. and two p. m., at the chancery court room, in the city of Newport, Ky., move the court, the chancellor, Hon. J. L. Menzies, presiding, to dissolve the injunction herein upon the whole case.

E. W. HAWKINS,
Att'y for Defendant.

Affiant Thomas Cayne states that he served the within notice upon the Newport Light Company upon the 2nd day of March, 1885, by delivering a true copy of said notice to John A. Williamson, president of said Newport Light Company; also, by delivering a true copy to Nelson and Washington, attorneys for said Newport Light Company.

Affiant further states that his endorsement is true that he is over 16 years of age, and that he is not a party to nor interested in the action.

THOMAS J. COYNE,
City Policeman.

This day and date came Thomas Coyne and states that the return above has been duly executed on day above mentioned.

259 JAMES A. FORBES,
Clerk Mayor's Court, City of Newport.

March 3rd, 1885.

The demurrer and reply filed March 3rd, 1885, is in words and figures as follows, to wit:

The plaintiff comes and demurs to the answer filed herein on the 2nd day of March, 1885.

And the plaintiff, in nowise waiving said demurrer, but expressly relying upon same, and for reply to said answer, denies that the proposition made by it and embraced in Exhibit "B" to the answer was so made in response to the re-olution of the board of councilmen of defendant, but says that the same was distinct from and in-

dependent of said resolution and not limited or intended to be limited by its terms or otherwise; to the period of one year, nor was any such limitation recommended or fixed by the defendant's committee on gas in its report to said board at its meeting held on the 21st day of February, 1884, and plaintiff says pursuant to the several proceedings of said board at said meeting, as set up in said answer, a written contract between plaintiff and defendant was prepared by defendant's official attorney and submitted to plaintiff for its signature; that by the terms thereof plaintiff was to furnish the gas, light, extinguish, and clean the public gas lamps of defendant city; keep the posts, lamps, lamp frames, service cocks, burners, tips, and all the appendages to said gas lamps in thorough repair and order at its own
260 proper cost and expense; that four-foot burners should be used; that what was known as the "moonlight schedule" should be adopted; that whenever an average of ten lights per night for a period of one week were not burning from any cause within the control of plaintiff there should be deducted from the contract price for the month when the same should occur the proportionate cost at contract price of the number of lights not so burning; that the then existing contract between plaintiff and defendant, being the same set forth in plaintiff's petition herein, was so modified as to conform to the terms of the contract so submitted to plaintiff for its signature, and that in consideration thereof the defendant was to pay plaintiff the sum of twenty and $\frac{25}{100}$ dollars per light per annum, payable in monthly instalments of $\$1.68\frac{3}{4}$ per light. A true copy of said contract is herewith filed as a part hereof, marked "Exhibit No. 1 to Reply."

And plaintiff says that it executed said contract and tendered its bond to said board obligating itself to faithful performance of said contract; that at a meeting of said board held on the 17th day of April, 1884, said bond was accepted by a majority vote of said board on a call of the yeas and nays; that thereafter, to wit, on the 1st day of May, 1884, at a meeting of said board, in regular session, the mayor of defendant city, pursuant to the authority in him vested under the charter of its incorporation, returned to said board the said contract and bond without his approval thereof upon the ground that they failed to definitely fix the time during which they should be in force, and thereupon, on motion of a member
261 of said board, said veto or disapproval of defendant's mayor was by a majority vote of said board, on a call of the yeas and nays, regularly adopted by said board. A copy of said veto message is herewith filed as a part hereof, marked "Exhibit No. 2 to Reply."

And plaintiff says that at said meeting so held on the 1st day of May, 1884, it was formally resolved by said board as follows, to wit: "Resolved, That the committee on law and city attorney be, and are hereby, required to report a bond and contract for one year with the Newport Light Company, as provided by resolution adopted by this board January 10th, 1884, in which bids were to be received for one year for the lighting and extinguishing of the public

lamps;" and thereupon, on motion, the defendant's official clerk was by said board directed to notify plaintiff of said action and to return to it the bond aforesaid; and plaintiff says that at the next regular meeting of said board held on the 15th day of May, 1884, it was moved by a member of said board that inasmuch as plaintiff had failed to present a bond and contract for the lighting and extinguishing of the public lamps of defendant city, as ordered by said board at its last meeting, the committee on law and city attorney take a bond drawn by said attorney to plaintiff for its signature, and to report their action to the board at its next meeting, and that they be instructed to notify plaintiff that in the event of its failure to report a bond and contract to said board at its next meeting acceptable to it the plaintiff's contract would be can-
262 celled; which motion, plaintiff says, was by said board unanimously adopted; and plaintiff says that pursuant thereto another contract, limited to one year, was prepared by defendant's official att'y, and that the same was in all respects the same as the first one presented to plaintiff for its signature, as hereinbefore stated, and vetoed by defendant's mayor, except as to said limitation of one year; that the same was presented to plaintiff for its signature, who agreed thereto, provided there were added to said contract the words following, to wit:

"And to the extent that the same is in conflict with this it is hereby rescinded," immediately following the provision in said contract; that the original contract, to wit, that mentioned in plaintiff's petition, should be so modified as to conform to the terms of said contract so submitted to plaintiff for its signature; and plaintiff says that afterwards, to wit, at a meeting of said board held on the 29th day of May, 1884, said committee on law reported to said board said contract with the words aforesaid added thereto; that at said meeting, on motion regularly made, said contract was referred by said board back to said committee on law and its official attorney for two weeks for the purpose of examining the contract embodied in the ordinance of June 3rd, 1880, being the same set up in plaintiff's petition for the purpose of ascertaining whether the acceptance by defendant of the contract so referred to said committee on law would vitiate said contract of June 3rd, 1880; that afterwards, to wit, on the 26th day of June, 1884, at a regular meeting of said board,
263 among other proceedings of same, not material here to be noted, it was moved by a member of said board that plaintiff's bond and the contract aforesaid, with the limitation of one year and the words added as aforesaid by plaintiff, be accepted, and that the mayor be thereby ordered to execute same on behalf of defendant city, which motion, plaintiff says, was by a majority vote, upon a call of the yeas and nays, lost and said contract and bond wholly rejected. And plaintiff says that no further action looking to the adoption or rejection of said contract or of the one set up in defendant's answer was taken by said board, but that said action so taken as aforesaid was final and conclusive, and that by reason thereof no contract whatever was made by and between plaintiff and defendant for the lighting and extinguishing of the

public lamps, etc., of defendant city, either as set forth in its said answer or otherwise; that no contract has been made in respect thereto between plaintiff and defendant, except as set forth in plaintiff's petition, which is still a subsisting contract, in nowise rescinded, cancelled, modified, or made void; and plaintiff denies that it made any contract with defendant in respect thereto other than as herein set up, or that said original contract was superseded by the alleged contract set up in said answer. Plaintiff denies that it has ever since, till February 8th, 1885, acted under said alleged contract of February 8th, 1884, but it admits that for a time it supposed and was led to believe that its contract and bond had been accepted by defendant, and that while so supposing and believing and in ignorance of the true state of affairs in respect thereto it proceeded to act in accordance with
264 said supposed contract, but received no payments thereunder; and plaintiff says that, with full knowledge in the premises, the defendant during all the time covered by said alleged contract continued to recognize the existence of said contract of June 3rd, 1880, as set forth in plaintiff's petition, and to act thereunder the same as prior thereto; that in virtue thereof and pursuant to its terms this plaintiff, by direction of defendant's board of councilmen, made during the period covered by said alleged contract and in obedience thereto laid in the public streets of defendant gas-pipe mains to the extent of 4,550 feet at a cost to plaintiff of $3,650.00, and that during the same period and under the same direction plaintiff erected twenty-one street gas lamp posts at a cost to plaintiff of $525.00. Plaintiff files herewith and as a part hereof seven distinct notices served upon it by defendant through its official clerk, as ordered so to do by its said board of councilmen, in respect to the laying of said mains and the erection of said posts, all except one made by defendant during the period covered by said supposed contract and marked respectively Exhibits Nos. 3, 4, 5, 6, 7, 8, and 9 to Reply.

And plaintiff says that it fully executed said several orders in implicit and complete reliance upon the terms and conditions of said contract of June 3rd, 1880, and in the utmost good faith; that defendant, both by said orders and in other ways, fully recognized the continued existence of said contract, never questioning same, and at all times permitting plaintiff to proceed in the execution of said orders
in the full belief and reliance upon the continued existence
265 and validity of said contract of June 3rd, 1880, and plaintiff says that defendant, its officers and agents, well knew that plaintiff was executing said orders in good faith and in reliance upon said original contract, and that while lighting and extinguishing defendant's lamps as aforesaid under said alleged contract of February 8th, 1884, defendant well knew that plaintiff was so doing under the mistaken idea that said contract had in fact been accepted by defendant. Plaintiff further says that when fully apprised of its mistake in that regard it claimed no contract in that behalf and now claims no rights under same, but relies upon its original contract with defendant.

NELSON & WASHINGTON,
Att'ys for Plaintiff.

John A. Williamson says that he is president of plaintiff and that the foregoing reply is true as he believes.

JOHN A. WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson this 13th day of March, 1885.

JOHN C. SCROLL, *Clk*,
By C. E. ALLEN, *D. C.*

The said Exhibits Nos. 1 to 9 to Reply are in words and figures respectively as follows, to wit:

"EXHIBIT NO. 1 TO REPLY."

This contract entered into this 8th day of February, 1884, by and between the city of Newport party of the first part, and the Newport Light Company party of the second part witnesseth, that the party of the second part does hereby agree and con-
266 tract with the party of the first part to furnish the gas, light, extinguish and clean the public gas lamps of the city, to keep the posts, lamps, lamp frames service cocks, burners, tips, and all the appendages to said gas lamps in thorough repair and order at their own proper cost and expense, and in consideration thereof the said party of the first part agrees to pay to the party of the second part the sum of twenty, $\frac{25}{100}$ dollars per light per annum payable in monthly instalments of $\$1.68\frac{3}{4}$ per light.

It is further mutually agreed by and between the parties hereto:

1st. That four-foot burners are to be used.

2nd. That what is known as the "moonlight schedule" is adopted.

3rd. That whenever an average of ten lights per night for a period of a week are not burning from any cause within the control of said party of the second part there shall be deducted from the contract price for the month when the same shall occur, the proportionate cost at contract price of the number of lights not so burning.

4th. That the existing contract between the parties hereto is so modified as to conform to the terms of this contract.

In witness whereof, the parties have hereunto set their signatures and seals this day and year first above mentioned.

NEWPORT LIGHT COMPANY,
By JOHN A. WILLIAMSON, *President.*

267 We, John A. Williamson and Thomas W. Gideon, sureties for the party of the second part to the above contract, do, for and in consideration of the execution of the said contract, hereby covenant to and with the city of Newport that the Newport Light Company will well and truly perform the above contract, and we further covenant that we will make good and pay to the city of Newport any and all loss it may sustain by reason of the failure of the said Newport Light Company to perform each and every covenant of the above contract.

JOHN A. WILLIAMSON.
THOS. W. GIDEON.

"EXHIBIT NO. 2 TO REPLY."

I herewith return to your honorable board the contract and bond of the Newport Light Company for lighting and extinguishing the public lamps without my approval for the following reasons:

The contract and bond, in my opinion, fail to state the time for which the contract is to run, and the city council should, in my judgment, ascertain this fact before the bond should be accepted and thus prevent in the future any misunderstanding between the city and the gas company.

(Signed) WILLIAM H. HARTON, *Mayor.*

"EXHIBIT NO. 3 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

268 NEWPORT, KY., *Ap'l* 17, 1884.

Newport Light Company.

GENTLEMEN: You are hereby notified to lay a gas main on Williamson street from Monmo-th to Brighton, in accordance with a resolution adopted by the board of councilmen adopted this day.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 4 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *Sept. 19th*, 1884.

To the Newport Light Company.

GENTLEMEN: By order of the board of councilmen you are hereby directed to erect lamp posts at the following-named places:

One corner of Overton and Madison streets, N. E. cor.
One corner of Overton and Madison streets, S. W. cor.
One corner — Kilgour and Madison streets, N. W. corner.
One corner of Powell and Brighton streets.
One corner Lowell and Goodman streets.
One corner Harris and Brighton streets.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 5 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

269 NEWPORT, KY., *Mch 26th*, 1884.

Newport Light Company.

GENTLEMEN: By order of the board of councilmen you are hereby directed to lay gas mains and erect lamp posts as follows:

Gas main in German street from McArthur to Ringgold.

Lamp posts, two at the intersection of McArthur & German and

one on German between McArthur and Ringgold and two at the intersection of Ringgold and German streets.

Gas mains on Lowell from Elm to Goodman.
Gas mains on Brighton from Goodman to Tibbatts.
Gas mains on Patterson from Goodman to Harris streets.
Lamp posts, 2 corner Goodman and Lowell.
Lamp posts, 1 at corner Brighton and Powell.
Lamp posts, 1 corner Brighton and Keturah.
Lamp posts, 2 corner Brighton and Harris.
Lamp posts, 2 corner Brighton and Lindsay.
Lamp posts, 2 corner Patterson and Keturah.
Lamp posts, 2 corner Patterson and Harris.
Lamp posts, 1 corner of front of entrance to Smiley's hall.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 6 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *Feb.* 4, 1884.

270 Newport Light Company.

GENTLEMEN: By a resolution adopted by the board of councilmen you are hereby directed to erect a lamp post on Ann street between Harris and Ringgold streets.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 7 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *December 9th*, 1884.

Newport Light Company.

GENTLEMEN: By order of the board of councilmen you are hereby directed to remove a lamp post on the south side of Bellevue just east of Saratoga street to the north side of the street, in the center of the block; also one on the west side of Washington avenue between Taylor and Bellevue streets to the east side of Washington avenue between said streets.

Very respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 8 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

271 NEWPORT, KY., *Nov.* 12, 1884.

To the Newport Light Co.:

GENTLEMEN: You are hereby directed to erect lamp posts by order of the board of councilmen at the following-named places, viz:

Two on the corner of Williamson and Putnam streets; one on Bellevue street opposite the Seminary building; one on Overton street between Madison and Jefferson streets.

Very respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 2 TO REPLY."

I herewith return to your honorable board the contract and bond of the Newport Light Company for lighting and extinguishing the public lamps without my approval for the following reasons:

The contract and bond, in my opinion, fail to state the time for which the contract is to run, and the city council should, in my judgment, ascertain this fact before the bond should be accepted and thus prevent in the future any misunderstanding between the city and the gas company.

(Signed) WILLIAM H. HARTON, *Mayor.*

"EXHIBIT NO. 3 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

268 NEWPORT, KY., *Ap'l* 17, 1884.

Newport Light Company.

GENTLEMEN: You are hereby notified to lay a gas main on Williamson street from Monmo-th to Brighton, in accordance with a resolution adopted by the board of councilmen adopted this day.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 4 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *Sept. 19th*, 1884.

To the Newport Light Company.

GENTLEMEN: By order of the board of councilmen you are hereby directed to erect lamp posts at the following-named places:

One corner of Overton and Madison streets, N. E. cor.
One corner of Overton and Madison streets, S. W. cor.
One corner — Kilgour and Madison streets, N. W. corner.
One corner of Powell and Brighton streets.
One corner Lowell and Goodman streets.
One corner Harris and Brighton streets.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 5 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

269 NEWPORT, KY., *M'ch 26th*, 1884.

Newport Light Company.

GENTLEMEN: By order of the board of councilmen you are hereby directed to lay gas mains and erect lamp posts as follows:

Gas main in German street from McArthur to Ringgold.

Lamp posts, two at the intersection of McArthur & German and

one on German between McArthur and Ringgold and two at the intersection of Ringgold and German streets.

Gas mains on Lowell from Elm to Goodman.

Gas mains on Brighton from Goodman to Tibbatts.

Gas mains on Patterson from Goodman to Harris streets.

Lamp posts, 2 corner Goodman and Lowell.

Lamp posts, 1 at corner Brighton and Powell.

Lamp posts, 1 corner Brighton and Keturah.

Lamp posts, 2 corner Brighton and Harris.

Lamp posts, 2 corner Brighton and Lindsay.

Lamp posts, 2 corner Patterson and Keturah.

Lamp posts, 2 corner Patterson and Harris.

Lamp posts, 1 corner of front of entrance to Smiley's hall.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT No. 6 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *Feb.* 4, 1884.

270 Newport Light Company.

GENTLEMEN: By a resolution adopted by the board of councilmen you are hereby directed to erect a lamp post on Ann street between Harris and Ringgold streets.

Respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT No. 7 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *December 9th*, 1884.

Newport Light Company.

GENTLEMEN: By order of the board of councilmen you are hereby directed to remove a lamp post on the south side of Bellevue just east of Saratoga street to the north side of the street, in the center of the block; also one on the west side of Washington avenue between Taylor and Bellevue streets to the east side of Washington avenue between said streets.

Very respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT No. 8 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

271 NEWPORT, KY., *Nov.* 12, 1884.

To the Newport Light Co.

GENTLEMEN: You are hereby directed to erect lamp posts by order of the board of councilmen at the following-named places, viz:

Two on the corner of Williamson and Putnam streets; one on Bellevue street opposite the Seminary building; one on Overton street between Madison and Jefferson street.

Very respectfully, W. F. McCLURE, *City Clerk.*

"EXHIBIT NO. 9 TO REPLY."

City of Newport, city clerk's office—W. F. McClure.

NEWPORT, KY., *May* 7, 1884.

Newport Light Co.

GENTLEMEN: You are herewith notified to erect a lamp post on Ringgold street in front of the school building, as given by order of city council May 1st.

Very respectfully, W. F. McCLURE, *City Clerk.*

The order of reinstatement of injunction filed March 20th, 1885, is in words and figures as follows, to wit:

The plaintiff in the above-styled action having prayed for
272 and obtained the following injunction, to wit:

"STATE OF KENTUCKY, }
Campbell County, } *ss:*

To the city of Newport, its officers, agents, &c.:

You are hereby enjoined and restrained from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public places or buildings of the city of Newport with gas or otherwise and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places in such quantities as may be re-uired for that purpose until the further orders of this court.

Given under my hand this 19th day of February, 1885.

JOHN C. SCHROLL,
Clk Campbell Chancery Court."

And the Campbell chancery court, in which said action is pending, having, on the 15th day of March, 1885, upon motion of the defendant, made the following order, to wit:

"The court being sufficiently advised, the injunction herein is dissolved, but this order is not to take effect for twenty days; meanwhile plaintiff has leave to apply for the reinstatement of the injunction."

Now, it appearing to the undersigned, judge of the court of appeals, that the plaintiff has secured the right to apply for the reinstatement of said injunction, and a copy of the record of all the proceedings had in said action having been presented to me, and being satisfied, I hereby, upon application of said plaintiff, order and direct the reinstatement of said injunction.

273 In testimony whereof I hereby, on this the 19th day of March, 1885, subscribe my official signature.

JOS. H. LEWIS,
Judge of Court of Appeals of Kentucky.

The affidavit of John A. Williamson filed May 6th, 1885, is in words and figures as followg, to wit:

John A. Williamson says that he is president of the plaintiff corporation, and that the presiding chancellor of this court will not afford said plaintiff a fair and impartial trial in said cause, as he verily believes.

JOHN A. WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson this 6th day of May, 1885.

JOHN C. SCHROLL, *Ct'k*,
By C. E. ALLEN, *D. C.*

And at a court held for said Louisville law and equity court on the 29th day of May, 1885—

Came all parties, by their respective counsel, and by consent the order of submission herein is now set aside.

And this action, having been heard, was submitted and the court, not being advised, takes time.

And at a court held for the court aforesaid on the 13th day of July, 1885—

274 The court, being now sufficiently advised, delivered a written opinion herein, which was ordered to be and now is filed herein.

It is considered by the court that the demurrer of the Dueber Light Company to the answer, counter-claim, and cross-petition of the Newport Light Company be, and the same is now, overruled.

And it is further considered and ordered that the demurrer of the Newport Light Company to the petition of the Dueber Light Company be, and the same is now, sustained.

To all which the Dueber Light Company excepts.

It is further considered and ordered that the injunction against the city of Newport be, and the same is now, made perpetual in the case of the Newport Light Company against the City of Newport; to which the city of Newport excepts.

And at a court held for the court aforesaid on the 18th day of July, 1885—

On motion of the Dueber Light Company, by counsel, it is ordered that the order entered herein on the 13th inst. be, and the same is now, set aside and held for nought.

And the court, being now sufficiently advised, delivered a written opinion herein, which was ordered to be and now is filed herein.

The said opinion of the court is copied into the record in the case of the Dueber Light Company, No. 1606, in this court, on page 42.

275 And at a court continued and held for the court aforesaid on the same day, to wit, on the 18th day of July, 1885—

The court being now sufficiently advised, it is considered and adjudged that the defendant, The City of Newport, its officers, agents, &c., be and now are perpetually enjoined and restrained from making

or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the city of Newport with gas or otherwise during the existence of the contract between the city of Newport and the Newport Light Company and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places, in such quantities as may be required for that purpose, according to contract between said parties as long as said contract shall remain in force.

It is further considered and adjudged that plaintiff recover of defendant its costs herein expended, for which it may have execution; to which defendant excepts; and, on its motion that the court determine the amount in controversy with a view to appeal, the court determines that the amount in controversy is more than $3,000.00; and thereupon defendant prays an appeal to the court of appeals, which is granted.

And on the 27th day of July, 1885, came the City of Newport and the Dueber Light Company, by counsel, and filed in the office of the clerk of said court their schedule herein in words and figures as follows, to wit:

276 The clerk will copy for the City of Newport and the Dueber Light Company for their appeal the entire record in the above cause.

HALLAM & MYERS,
J. C. WRIGHT,
E. W. HAWKINS,
WM. LINDSAY, *Attorneys.*

COMMONWEALTH OF KENTUCKY, }
Louisville Chancery Court, } *sct:*

I, John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk of the Louisville law and equity court, do certify that the within and foregoing 49 pages, this included, contains a full, true, and complete transcript of the record and proceedings had in said last-named court (except the opinion of the court, which opinion is copied into the record in an action in said court, No. 1606, at page 42, &c.) in an action lately pending in said court, No. 1607, wherein The Newport Light Company was plaintiff and The City of Newport was defendant, as appears of record in my office.

Witness my hand this 28th day of July, 1885.

JNO. H. WELLER,
Clk Lou. Ch'y Ct & ex Officio Clk Lou. Law & Equity Ct.

On which transcript the following statement is endorsed:

Statement.

277 Court of Appeals of Kentucky, September Term, 1885.

THE CITY OF NEWPORT, Appellant,
against
THE NEWPORT LIGHT COMPANY, Appellee.
} Statement. Appeal from the Louisville Law and Equity Court.

The judgment appealed from was rendered July 18th, 1885, and will be found on page 48 of this record.
Appeal granted below.
No process required.

E. W. HAWKINS AND
HALLAM & MYERS,
For Appellant.

("Page 48," referred to above, corresponds to page 95 of this transcript, upon which the judgment may be found.—Copyist.)

Afterwards, at a court of appeals begun and held for the State of Kentucky, at the capitol, in the city of Frankfort, on September 26, 1885, the following order was entered:

Order to Set for Argument.

CITY OF NEWPORT, Appellant,
vs.
THE NEWPORT LIGHT CO., Appellee.

THE DUEBER LIGHT CO., Appellant,
vs.
THE NEWPORT LIGHT CO., Appellee.

Appeal from the Louisville law & equity court.

Came appellants, by counsel, and moved the court to set these cases for October 6 for oral argument.

Afterwards, at a court of appeals held as aforesaid on October 1, 1885—

Order Setting for Argument.

The court being sufficiently advised, it is considered that these causes be advanced and set for oral argument October 8th.

278 Afterwards, at a court of appeals held as aforesaid on October 3, 1885—

Order Postponing Argument.

Ordered that the oral argument of these cases be postponed until October 21st.

Afterwards, at a court of appeals held as aforesaid on October 21st, 1885—

Noting Argument to Court of Appeals & Submission.

These causes came on and were argued by George Washington, for appellee, and Theodore F. Hallam, for appellant, and laid over for further argument.

And on October 22, 1885, these causes were argued by John G. Carlisle, for appellee, and William Lindsay, for appellants, and submitted.

Afterwards, at a court of appeals held as aforesaid on May 20th, 1886, the following orders and judgments were entered:

CITY OF NEWPORT, Appellant,
vs.
NEWPORT LIGHT CO., Appellee. } Appeal from the Louisville Law and Equity Court.

Judgment.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein.

279 *Judgment.*

DUEBER LIGHT COMPANY, Appellant,
vs.
NEWPORT LIGHT COMPANY, Appellee. } Appeal from the Louisville Law & Equity Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein.

At the same time the said court of appeals delivered the following opinion, to wit:

Opinion of C't of Appeals.

This litigation is between the appellants, The City of Newport and The Dueber Light Company, on the one side, and the Newport Light Company, on the other. The several actions were originally instituted in the Campbell chancery court and transferred to the Louisville chancery court and there heard and determined by the vice-chancellor in favor of the Newport Light Company.

The Dueber Light Company filed its petition alleging its existence as a corporation created and organized under the provisions of

chapter 56 of the General Statutes, and claims to have full power and authority to contract for and supply the inhabitants of the city of Newport with gas for illuminating and other purposes, and to have, hold, own, and maintain all pipes, property, and fixtures necessary for said purpose; further alleging that, as a corporation,

280 it had been given full power, authority, and right by the mayor and board of councilmen of the city to enter upon the streets, lanes, alleys, and public places of the municipality and upon any and all of its streets, etc., to lay their pipes and all necessary fixtures for supplying the citizens and inhabitants of the said city with gas for illuminating and other purposes, and that plaintiff is now in the full possession of and entitled to the enjoyment of those rights.

That on the third day of June, 1880, the mayor and board of councilmen of the city of Newport passed an ordinance entitled "An ordinance further providing for the lighting of the city of Newport, Kentucky," section 1 of that ordinance providing "that from and after the passage of this ordinance there shall be, and is hereby, granted unto the Newport Light Company and their successors the exclusive privilege of using any or all of the streets, lanes, commons, alleys, and public places of the city for the purpose of laying pipes to convey any supply gas to the city of Newport and others, this privilege -- for twenty-five years from the date hereof and until the city shall give the company twelve months' notice to terminate the same, and embraces the right of said company to use said streets, lanes, alleys, and public grounds for establishing and conducting said business."

It is also alleged that (the defendant) The Newport Light Company under and by virtue of said contract was claiming and asserting the sole and exclusive right to the use of the streets, alleys, public places, etc., of the city of Newport for the purpose of laying down its pipes and fixtures, that it might supply the city and its inhabitants with gas.

281 That the city of Newport had no right, power, or authority to grant to the Newport Light Company or to any other corporation such an exclusive right to the use of its streets for the period of twenty-five years or for any other period of time, and therefore said grant is null and void. It is further alleged that the Newport Light Company was obstructing and preventing the plaintiff from executing its contract; that its stock had not been fully paid, and the defendant, by the assertion of this exclusive right, was clouding the right and franchise of the plaintiff, and preventing it from conducting its said business, and delaying the payment of the stock subscription, and preventing the making of further subscriptions thereto.

A temporary injunction was granted, enjoining and restraining the Newport Light Company from asserting its exclusive right. The contract with the Dueber Light Company was made on the nineteenth of February, 1885.

An answer was filed to this petition by the Newport Light Company that was made a cross-petition against the city of Newport,

and the city enjoined, at the instance of the Newport Light Company, from conferring upon the Dueber Light Company the right or privilege of laying pipes in its streets, alleys, public places, etc., for the purpose of supplying gas to the city or its inhabitants.

On the 19th of February, 1885, the Newport Light Company also filed its petition, by which an injunction was granted, enjoining the city of Newport from entering into the contract with the Dueber Light Company or from conferring upon that company the
282 right to enter upon its streets for the purpose of laying down its pipes, etc.

In this proceeding the contract between the Newport Light Company and the city, entered into in the month of June, 1880, is fully set forth, and the further averment that it had entered upon the streets by laying down its pipes, etc., and was then and had been executing its part of the contract and performing all the conditions thereof.

By the stipulations of the contract the Newport Light Company and its successors from and after the 11th of June, 1882, was given the exclusive privilege of using the streets, public places, etc., of the city for the purpose of laying pipes to convey and supply gas to the city and others, said privilege to be enjoyed and used for the term of twenty-five years from June 11th, 1882, and until the city should give the company twelve months' notice to terminate the same.

The plaintiff was to furnish to the city, upon its several streets, lanes, and alleys and public places in which pipes were laid, a continuous supply of gas equal in quality to Cincinnati gas in such quantities as the defendant might require and direct for the use of the public streets, lamps, and public buildings owned by it at a fixed price for each one thousand cubic feet; that gas should be furnished the inhabitants of the city for their private consumption at rates as follows, viz: At $1.90 per thousand cubic feet for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet for the period of five years from June 11th, 1887; at $1.75 per thousand feet for fifteen years from June 11th, 1892. All
283 public places, lamps, lamp posts, and other requisite fixtures to be furnished by the company and erected at such times, places, and in such numbers where the main pipes are laid as the city may direct. The contract between the parties contained many other stipulations not necessary to be considered. The City of Newport, in its answer to this petition of the Newport Light Company, says that if there was a valid contract between the city and the Newport Light Company, which it denies, the same was superseded by a contract entered into between the two on the 21st of February, 1884. This subsequent alleged contract was attempted to be made, but never executed by either of the parties, and the principal question presented on the two appeals involves the right of the city of Newport to enter into the contract with the Newport Light Company, by which the latter was given the exclusive right to lay down its pipes on the streets of the city and furnish to the

city and its inhabitants illuminating gas for the period of twenty-five years.

If that contract is valid the judgment below, perpetuating the injunction against the city and enjoining the Dueber Light Company from laying its pipes in the streets for the purpose of furnishing gas to the city and its inhabitants, was proper and must be affirmed.

The act incorporating the Newport Light Company provided that "it might furnish any city, town, district, corporation, or locality or any public institution, manufacturing establishment, or private persons with gas or other light for such time and upon such terms as may be agreed upon by the parties."

284 The charter of the city of Newport empowered that municipality "to construct, maintain, and operate gas works, and to pass all ordinances necessary to regulate the same." Acts 1873–'74, page 337, section 10.

It is plain from this part of the city's charter that its council had the right not only to construct gas works and enter upon the streets for the purpose of laying down pipes, but it was, in effect, a general grant of power to have the city lighted with gas and to contract with the Newport Light Company or others to furnish it upon such terms as the parties might agree. While grants of power to such corporations are to be strictly construed, the object sought to be accomplished must be considered, and being invested with the right to light its streets with gas, or to construct and maintain gas works for that purpose, its right to contract under such a power is unquestioned.

So each of the contracting parties, clothed with legislative authority for the particular purpose, have contracted with reference to this franchise, and the Newport Light Company had entered upon the streets of the city, and at the institution of these actions was in the undisturbed enjoyment of the franchise under its contract and in the actual discharge of its obligations to the city by reason of its stipulations. It is insisted by counsel for the Dueber Light Company that, while the Newport Light Company may have been permitted to lay down its pipes in the streets of the city, it has no such exclusive right as will prevent the city from granting the same right to another corporation.

285 If a mere license or permission to use these streets is the only grant made or privilege conferred on the Newport Light Company, it may well be argued that similar privileges may be granted to others. But the claim of the appellee (The Newport Light Company) to the exclusive use of the streets is based upon a contract entered into between it and the city of Newport, by which an obligation was created on the part of the company to the city to furnish gas to the public and to the private consumers for the period of twenty-five years, and this obligation was the consideration for the grant of the franchise. If the city could make such a contract for the use of its streets no such question as that of an exclusive privilege can arise. A mere license or use of a public street to a private corporation, although devoted to a public use, does not

confer an exclusive privilege; but where it is encumbent on a municipal corporation to furnish light and water for the public use and that of its inhabitants, the right to exercise the power to supply such wants might well be argued as within the range of legitimate municipal legislation.

It may be regarded, however, as well settled that the right to use the street of a city by a gas company to enable it to lay down its pipes "is a franchise that can be granted only by the legislature or some local or municipal authority authorized to confer it." Dillon on Municipal Corporations, 2d volume, section 691. "However it may be as respects the power of the legislature to make the grant exclusive, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words
286 or by necessary or at least reasonable implication." Dillon on Municipal Corporations, section 695.

If it is the duty of the municipality to light its public streets and to furnish its inhabitants with the means of obtaining gas at their own expense, and having the power by legislative grant to erect and maintain gas works for that purpose, it necessarily follows that it has the implied power to contract with others to furnish it in like manner, and where there is a valid contract to that effect we perceive no reason why it should not be enforced or governed by the same rules applicable to contracts between natural persons.

It will not be contended that the city, through its council, can enter into such a contract in the discharge of a public duty and then violate its provisions at the will and pleasure of the council or disregard its obligation when terms more favorable are offered by some other corporation.

Nor do we perceive the philosophy of the rule that prevents the municipality from contracting with an individual or a corporation to furnish gas to the city or its inhabitants for a fixed and definite period if the right to contract is derived from the sovereign power. "A private corporation, as well as individuals, may be employed by a city to aid in the construction of works needed for the health, comfort, and convenience of its citizens." New Orleans *vs.* Clark, 95 U. S. Supreme Court, —.

In the present case the private corporation known as the
287 Newport Light Company is invested in express terms by a provision contained in its charter with the right "to furnish any city, town, district, corporation or locality, or any public institution, manufacturing establishment, or private premises with gas or other light for such time and on such terms as may be agreed on by the parties." Under that power it contracted with the appellant (The City of Newport) to furnish it gas for the use of the public and its inhabitants for twenty-five years, with the exclusive right to the use of its streets for the purpose of laying down its pipes. It expended largely over one hundred thousand dollars to enable it to execute its contract, has violated none of its provisions, and the city is now maintaining that the contract is void as to the exclusive privilege conferred and binding only to the extent that the corporation can furnish gas for such public use as may be required by

the city; that the Dueber Light Company should be allowed to lay down its pipes and furnish to such of its inhabitants as may choose to purchase its gas at a less price, leaving the appellee with its large expenditure, with no other return from the investment than the small sum to be realized from lighting the streets of the city.

It is conceded by the Dueber Light Company that the city of Newport had the right to contract with the Newport Light Company, but, like the city of Newport, it insists that the provision of its contract conferring the exclusive privilege is void. The cases of The State *vs.* Cincinnati Gas Company, 18th Ohio, and The Nor-
288 wich Gas Light Company against The Norwich City Gas Company, and the general doctrine laid down by Dillon on Corporations *is* relied on to sustain this view of the question.

The question of exclusive privileges, the creation of monopolies, and the want of consideration or mutuality in the contracts controlled the decisions in those cases, and, we may add, the rule of law recognized in those cases and the reasoning upon which they are based or in the cases following them has not been sustained or approved in the recent decisions of the Supreme Court in cases involving like questions.

In the case of The New Orleans Gas Company *vs.* Louisiana Light Company, 115 U. S., the Supreme Court, through Mr. Justice Harlan, said, "It is difficult to perceive upon what ground we can deny her authority (the State), when not forbidden by her organic law, in consideration of money to be expended and important service to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies;" and again, "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts." Pages 665–672.

Nor is legislation of this character "liable to the objection that it is a mere monopoly, preventing citizens from engaging in an
289 ordinary pursuit or business open as of common right to all upon terms of equality, for the right to dig up the streets and public ways of New Orleans and place therein pipes and mains for the distribution of gas for public and private use is a franchise, the privilege of exercising which could only be granted by the State or by the municipal government of that city acting under legislative authority." Page 659. New Orleans Gas Company *vs.* Louisiana Light Company; Louisville Gas Company *vs.* Citizens' Gas Company; New Orleans Water Works *vs.* Rivers, 115 U. S. Reports.

The power of the legislature or the city of Newport, under legislative authority, to grant an exclusive privilege is not, therefore, involved in this case. It is purely a question of contract; and if the city of Newport had the right to contract with the appellee to furnish gas to the city and to such of its inhabitants as might de-

sire to use it the contract should be enforced, and neither the city nor any individual or corporation can interfere with its rights under it.

Exclusive privileges can only be granted in consideration of public services; but this provision of the bill of rights has no application to this class of contracts, nor does the exercise of the police power for the protection of the public health or public morals affect the questions involved.

The contract for the supply of gas in this case must necessarily be exclusive. Each party had the right to contract, and by its stipulations the appellee is bound to furnish gas to all buildings along the lines of these main pipes when compensation is
290 made or offered to be made as required by the contract. The city has exhausted its power and done that which, under legislative authority, it had the right to do, and besides contracted with the appellee that by the terms of its charter had been invested with the special privilege of entering into such contracts, nor do we perceive how a contract could well be made without any limit as to time or restrictions in some way upon the rights of the parties making it.

The contract with the appellee may have been injurious to the best interests of the city; but, however that may be, having been entered into by the properly constituted authorities upon a consideration that they deemed adequate and proper, there is no reason for disregarding its provisions.

The chancellor is powerless to relieve the municipality of the consequences resulting from an improvident contract where its council had the power to execute it. In order to the discharge of a public duty that consisted not only in lighting its streets and public places, but in placing gas within the reach of its inhabitants, the city has been given the right to the use of the streets for that purpose.

The private citizen had no right to the exercise of the franchise, and while the mere privilege of laying down pipes in the streets or rails upon the surface for street railways for private gain, and without any obligation on the part of the company undertaking it that can be enforced, cannot be made exclusive, when parties have contracted, by the direction of the sovereign power, to discharge a public duty that is not only necessary but indispensable to both public and private interests, the contract is as sacred as if
291 made between individuals competent to contract in matters affecting the right of private property, and must be controlled by the same general principles applicable to all contracts. We must interpret this class of contracts and the legislation under which they are made (as in all other cases of contracts) in the light of reason and with a view of carrying into effect the legislative intent. The exercise of the franchise was necessary to accomplish the object in view. It was indispensable to enable the appellee to comply with its terms, and no individual or corporation would have invested such a large sum of money as is conceded was requisite for a compliance with the demands of the municipality, with the privilege on the part of the council to abandon its terms in part, at

least, because other contracting parties were offering terms less expensive to the city or its inhabitants—an expenditure of over one hundred thousand dollars in 1882 that it could be deprived of, or the profits, at least, in 1885.

The contract with a corporation is as inviolable when the right to contract exists as with natural persons. The city council of Newport, looking to the comfort and convenience of its population and the public welfare, has contracted with the appellee to furnish gas for a fixed period. There is no pretense that any of its provisions have been violated by the appellee, or that it has any of the elements of fraud or mistake fatal to any contract, and therefore the law should recognize its validity and enforce its obligation.

The right of the appellee to seek protection from the chan-
292 cellor to preserve the franchise is now a familiar rule of equity jurisprudence. Jersey City Gas Company *vs.* Dwight, 29th New Jersey.

With this view of the questions presented, it becomes unnecessary to determine the power of the Dueber Light Company to enter into such contracts.

In our opinion the judgment of the vice-chancellor was proper, and is, therefore, affirmed.

The plaintiff in error filed in the office of the clerk of the Kentucky court of appeals on September 21st, 1893, a writ of error as follows:

293 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City of Newport, A. S. Berry, mayor, and P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, William Cassidy, Jacob Smith, George Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, and Benjamin Keim, members of the board of councilmen of the city of Newport, appellants, and The Newport Light Company, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
294 statute of or commission held under the United States and the decision was against the title, right, privilege, or ex-

emption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellee, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

295 The plaintiff in error also filed in the office of said clerk on said September 21st, 1893, a supersedeas bond in words following, to wit:

Know all men by these presents that we, the Newport Light Company, as principal, and R. W. Nelson and G. R. Harms, as sureties, are held and firmly bound unto the City of Newport *et al.* in the full and just sum of one thousand dollars, to be paid to the said The City of Newport *et al.*, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a court of appeals of the State of Kentucky, in a suit depending in said court between The City of Newport *et al.*, appellants, and The Newport Light Company, appellee, a judgment was rendered against the said appellee, and the said appellee having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said appellants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden in Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said

appellee shall prosecute said writ to effect and answer all
296 damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE NEWPORT LIGHT CO., [SEAL.]
By G. R. HARMS, *Pres't.* [SEAL.]
R. W. NELSON.
G. R. HARMS.

Approved by—
H. B. BROWN,
Associate Justice Sup. Court U. S.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify that the foregoing 295 pages and this partial page contain a true and complete transcript of the record and proceedings had in said court of appeals on the appeal of The Mayor and Board of Councilmen of the City of Newport, appellants, against The Newport Light Company, appellee, from a judgment of the Louisville law & equity court, punishing appellants for contempt, and of the record of the two former appeals of The Dueber Light Company and The City of Newport against The Newport Light Company, filed and considered with this record upon the trial of this appeal, and also the original of the writ of error, a copy of which has this day been filed in my office, and a copy of the supersedeas bond, the original of which has this day been filed in my office, as appears of record and on file in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 21st day of September, A. D. 1893.

Seal Kentucky Court of Appeals.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

My fee for this transcript, $118.00.

297 To the Honorable Justice H. B. Brown, of the Supreme Court of the United States:

Your petitioner, The Newport Light Company, a company duly incorporated and organized under the laws of the Commonwealth of Kentucky and having its principal office in the city of Newport, in said Commonwealth, respectfully states as follows:

First. That in a suit in the court of appeals of the Commonwealth of Kentucky, wherein The City of Newport, A. S. Berry, mayor, and P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, Wm. Cassidy, Jacob Smith, Geo. Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, and Benjamin Keim, members of the board of councilmen of the city of Newport, were appellants and the said Newport Light Company was appellee, *whereby* said appellants, on an appeal taken

by them from a judgment of the Louisville law and equity court, sought to reverse said judgment against *the* them in favor of the appellee, the said court of appeals being the highest court in said Commonwealth in which a judgment or decree in said suit could be had.

Second. That said court of appeals at its —— term, A. D. 1893, by its decision rendered a judgment against and adverse to your petitioner, the appellee in said suit, reversing the judgment of said Louisville law and equity court and awarding judgment for costs in favor of said appellants against said appellee, all of which appears by the record of said suit, a certified copy of which is presented herewith.

Third. That afterwards, on June 3rd, 1893, at the said —— term of said court of appeals, there was entered on the record of
298 said suit, as will appear by the certified copy thereof, herewith presented, by said court of appeals the following certificate:

"Upon the application of said Newport Light Company, appellee, it is certified by the court here that on the trial and hearing of this suit and case said appellee set up and relied upon the charter granted to it by the General Assembly of the Commonwealth of Kentucky on the 27th day of March, A. D. 1880, which charter contains the following provisions, that 'it might furnish any city, town, district, corporation, or locality or public institutions or private persons with gas or other light for such time and upon such terms as may be agreed upon by the parties;'" that said appellee further set up and relied upon a contract made between said appellee and appellant under and by virtue of an ordinance passed on the third day of June, 1880, all the provisions of said ordinance being embodied in the aforesaid contract by the mayor and board of councilmen of The City of Newport, the appellant, the first, third, and seventh sections of which ordinance read as follows:

"SECTION 1. That from and after the passage of this ordinance, there shall be, and is hereby granted unto the Newport Light Company and their successors, the exclusive privilege of using any or all of — streets, lanes, commons, alleys and public places of the city, for the purpose of laying pipes to convey and supply gas to the said city of Newport and others; this privilege is granted for the term of twenty-five years from the date thereof, and until the city shall give said company twelve (12) months' notice to terminate the same, and embraces the right of said company to use said streets, lanes, alleys and public grounds for establishing and conducting said business."

"SECTION 3. The said Newport Light Company shall furnish to the city of Newport, upon the several streets, lanes, alleys and public places of the city of Newport, in which pipes are laid, a continuous supply of gas (equal in quality to Cincinnati gas) in such quantities as the said city may require, and direct for the use of the public street lamps and public buildings owned by the city, or ordered by the board of councilmen, at the rate of $1.20 per one thousand cubic feet; said board of councilmen shall determine what size burners shall be used, so that they shall not burn less than four

feet to the hour for each, and the lighting thereof shall be regulated in such manner as may from time to time be directed by the board of council of the city of Newport. The amount of gas consumed by public street lamps and in public buildings owned by the city, to be ascertained by the customary meter measurement. Gas
299 shall be furnished to the citizens for their private consumption at the following rates, viz: At $1.90 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11, 1887; at $1.75 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of fifteen years from June 11th, 1892."

"SECTION 7. Said company or their successors may adopt any other mode equal to gas for supplying light to the city and its inhabitants, etc., provided that the same shall be done at no greater cost or expense to the city or consumers, than the gas-light."

That by an act of the General Assembly of the said Commonwealth passed on the 9th day of April, 1890, there was incorporated a company known at the trial and hearing on this suit and case as the Suburban Electric Illuminating, Heating and Power Company, the seventh section of which act is as follows:

"SECTION 7. The general nature of the business of the corporation shall be the erecting, operating and maintaining a general system of electrical dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat and power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants and other persons and corporations, and municipal corporations, located in or near said city, with light, heat and power by the electric current."

That under and by virtue of the authority of said act of said State the said appellant and said Suburban Electric Illuminating, Heating and Power Company on the 23rd day of April, 1891, made and entered into a contract by which the said company undertook and agreed to light the streets, alleys, and public places in said City of Newport, appellant, with electricity for the period of fifteen years, and said city agreed to pay for the same at the prices stated in said contract.

And it is further certified by the court here that on the trial and hearing of this suit and case in this court the validity of said act of the General Assembly incorporating the said Suburban Electric Illuminating, Heating and Power Company and the authority exercised under the same in making said contract between said
300 appellant and said last-named company as aforesaid was drawn in question on the ground that the case impaired the obligation of the contract between the appellant and the appellee before mentioned and was repugnant to the Constitution of the United States, and that the decision of this the highest court of law and equity of this State in which a decision of this suit could be had was in favor of the validity of said last-mentioned act of the

said General Assembly and of the authority exercised thereunder by said appellant in making said contract with said Suburban Electric Illuminating, Heating and Power Company.

Fourth. That, as appears by said record, the decision of said court of appeals was adverse to the right and title claimed by your petitioner.

Wherefore, and as the value of the matter in controversy exceeds the sum of five thousand dollars, your petitioner respectfully prays your honor to allow a writ of error and citation in said suit to the Supreme Court of the United States, so that the error complained of shall be duly corrected.

JOHN G. CARLISLE &
NELSON & DESHA,
Attorneys for Petitioner.

To the clerk of the circuit court of the United States in and for district of Kentucky:

I allow a writ of error to the Supreme Court of the United States, as prayed for in the foregoing petition, in favor of The Newport Light Company, plaintiff, against The City of Newport, A. S. Berry, mayor, and P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, Wm. Cassidy, Jacob Smith, Geo. Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, James E.
301 McCracken, John Schnorr, and Benjamin Keim, members of the board of councilmen of the city of Newport, defendants.

HENRY B. BROWN,
Justice of the Supreme Court of the United States.

Dated Aug. 26, 1893.

302 UNITED STATES OF AMERICA, *ss:*

To the City of Newport, A. S. Berry, mayor, and P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, William Cassidy, Jacob Smith, George Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, and Benjamin Keim, members of the board of councilmen of the city of Newport, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Newport Light Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 13th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

HENRY B. BROWN,
Associate Justice Sup. Court U.S.

303 On this 27th day of September, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared W. H. Cox before me, the subscriber, H. H. Deputy, a notary public in and for the county of Campbell and State of Kentucky, and makes oath that he delivered a true copy of the within citation to the City of Newport by delivering the same to George H. Ahlering, mayor and chief executive officer of said city, and on A. S. Berry, P. J. Ryan, John Halloran, M. Donelan, James Knoblaugh, John Wall, William Cassidy, Jacob Smith, George Tippenhauer, Ed. Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, and Benjamin Keim, members of the board of councilmen of the city of Newport, Ky.

W. H. COX.

Sworn to and subscribed the 27th day of Sept., 1893.

[Seal H. H. Deputy, Notary Public, Campbell Co., Ky.]

H. H. DEPUTY,
Notary Public.

Endorsed on cover: Case No. 15,406. Kentucky court of appeals. Term No., 1022. The Newport Light Company, plaintiff in error, *vs.* The City of Newport, A. S. Berry, mayor, *et al.* Filed September 28th, 1893.

Office Supreme Court U. S.
FILED.
JAN 2 1894
JAMES H. McKENNEY,
CLERK.

MOTION TO DISMISS
MOTION TO AFFIRM
BRIEF FOR DEFENDANTS IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, 1893.

No. 1022.

THE NEWPORT LIGHT COMPANY,
Plaintiff in Error,
vs.
THE CITY OF NEWPORT, *et al,*
Defendants in Error.

In Error to the Court of Appeals for the State of Kentucky.

15,406.

Motions, - - - - - - - - pages 1 and 2.
Brief, - - - - - - - - - pages 3 to 10.
Appendices (from record), - - - - pages 11 to 49.

Supreme Court of the United States,

OCTOBER TERM, 1893.

NEWPORT LIGHT COMPANY,
Plaintiff in Error,
vs.
THE CITY OF NEWPORT, *et al,*
Defendants in Error.

Motion to Dismiss for Want of Jurisdiction.

Now come the defendants in error, The City of Newport, A. S. Berry, Mayor, and P. J. Ryan, John Holleran, M. Donelan, James Knoblaugh, John Wall, William Cassidy, Jacob Smith, George Tippenhauer, Edward Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr, and Benjamin Keim, members of the Board of Councilmen of the City of Newport, by their Counsel William Lindsay and C J. Helm, and respectfully request and move this honorable Court to dismiss this writ of error, and as ground therefor, say:

1st. That the judgment of the Court of Appeals for the State of Kentucky, in which is the alleged error of which plaintiff complains, directs a rule which had issued from the Louisville Law and Equity Court against the defendants in error, to show cause, if any they could, why they should not be punished for a contempt of said Court, to be discharged, and adjudges said defendants their costs therein, and no more. (For the judgment, see page 89 printed record. For the rule, see page 11 printed record).

2nd. That there was, and could have been no federal question involved, considered or decided by the Court of Appeals for the State of Kentucky, in the judgment wherein the plaintiffs complain there was error.

3rd. That the contract which plaintiff in error complains was impaired by an act of the Legislature of the Commonwealth of Kentucky, was expressly held to be unimpaired by the Court of Appeals of the State of Kentucky, and the only question there decided against plaintiff in error, was a denial of enforcing specific performance by process of contempt, and that this was the only question in the cause that plaintiff in error contends is a federal question.

WM LINDSAY, and
C. J. HELM,
Counsel for Defendants in Error.

MOTION TO AFFIRM.

Now come the defendants in error, The City of Newport, A. S. Berry, Mayor, and P. J. Ryan, John Holleran, M. Donelan, James Knoblaugh, John Wall, William Cassidy, Jacob Smith, George Tippenhauer, Edward Enneking, James Dunnigan, J. H. Eggleston, James E. McCracken, John Schnorr and Benjamin Keim, members of the Board of Councilmen of the City of Newport, and respectfully move this Court to affirm the judgment of the Court of Appeals of Kentucky because it is manifest from the record that the writ of error was asked for delay only.

WM. LINDSAY and
C. J. HELM,
Counsel for Defendants in Error.

BRIEF ON MOTIONS FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

On the 3d of June, 1880, the Board of Councilmen of the City of Newport passed an ordinance, the terms of which were duly accepted by the Newport Light Company, and which plaintiff in error claim constitutes a contract to light the City of Newport with gas or otherwise for a term of twenty-five years, to the exclusion of all others. (For this ordinance see appendix "A," page 11).

In the spring of 1885 the Dueber Light Company attempted, with the consent of the City of Newport, to lay pipe in the streets of the City of Newport; and in a litigation which ensued, a transcript of which is in this record, the Louisville Law and Equity Court rendered a judgment, July 18th, 1885, as between the Newport Light Company and the City of Newport, in these words:

"The Court being now sufficiently advised, it is considered and adjudged that the defendant, the City of Newport, its officers, agents, etc., be and are now perpetually enjoined and restrained from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the City of Newport, with gas or otherwise, during the existence of the contract between the City of Newport and the Newport Light Company for the lighting of said places, in such quantities as may be required for that purpose, according to contract between said parties, as long as said contract shall remain in force." (SEE PAGES 151 AND 152 OF PRINTED RECORD.)

This judgment was affirmed by the Court of Appeals, May 20th, 1886.

On the 19th of March, 1887, a supplemental contract was entered into between the City of Newport and the Newport Light Company, which modified the original contract of June 3rd, 1880, and, as claimed by these defendants in error, to an extent that rendered the judgment of the Louisville Law and Equity Court, above quoted, no longer operative. (For this contract see appendix "B," page 15).

On the 23d of April, 1891, the Board of Councilmen of the City of Newport adopted this resolution:

"Be it resolved, that the accompanying contract between the City of Newport and the Suburban Electric Illuminating, Heating and Power Company, for lighting the City by electricity, be entered into by the City, and that the mayor be and he is hereby directed to execute the same on behalf of the City; and that the City discontinue the use of the lamp posts now in use for both gas and gasoline, and the gas light thereby furnished, on and after July 1st, 1891, and that the city clerk is directed to notify the Newport Light Company thereof, and request that it send the city a statement of the original cost of the lamp posts, including the requisite fixtures thereof." (See page 3, printed record. For the contract, see appendix "C," page 19).

The City of Newport claimed the right, under the contract of June 3rd, 1880, as modified by the contract of March 19th, 1887, to discontinue the lamp posts and the gas light by paying the original cost of the lamp posts, including requisite fixtures.

On the 7th of July, 1891, the Newport Light Company, the plaintiff in error, procured a rule from the Louisville Law and Equity Court to issue against the defendants in error. The rule was in these words:

"To the Sheriff of Campbell County, Greeting:

On motion of the Newport Light Company, by J. G. Carlisle, attorney, a rule was awarded it against the City of Newport, A. S. Berry, * * * * and J. H. Eggleston, returnable July 13th, 1891, to show cause, if any they have or can, why they should not be punished for contempt of Court. Witness John H. Weller, Clerk of the Louisville Chancery Court and ex-officio Clerk Louisville Law and Equity Court, this 7th day of July, 1891.

"JOHN H. WELLER, *Clerk*.

"By JOHN M. O'NEIL, *D. C.*"

The rule issued upon an affidavit of the President of the plaintiff in error, The Newport Light Company, and the act, which it was charged constituted the contempt, was the adoption of the resolution above quoted. (For the affidavit, see Appendix "D," page 24).

Three of the defendants in error, to wit: George Tippenhauer, John Schnorr and Michael Donelan, having responded, denying participation in the passage of the resolution, were discharged. (See page 14 of printed record.)

The other defendants in error demurred to the affidavit upon which the rule was issued, and filed a response. (For response and exhibits accompanying same, see Appendix "E," page 26.)

On the 13th of July, 1891, the Court rendered the following judgment:

"The Court being sufficiently advised, it is now ordered and adjudged that the demurrer and exceptions of the respondents to the rule and affidavit herein are overruled, to which said respondents except, and the demurrer of the Newport Light Company to the response filed herein is sustained, and the said response is adjudged insufficient, to which said respondents except, and, the respondents to the rule failing to make further response, it is adjudged that the acts set forth in the affidavit herein constitute a violation of the injunction heretofore granted in these causes, to which said respondents except: and the said respondents are allowed until the twenty-fourth day of July, eighteen hundred and ninety-one, to purge themselves of their contempt herein by setting aside and annulling the contract with the Suburban Electric Illuminating, Heating and Power Company, dated April 23d, 1891, and ceasing to light or to have lighted the streets, lanes, alleys, public buildings or places of the City of Newport under said contract; and the said respondents are hereby ordered to rescind and set aside, before the said twenty-fourth day of July, eighteen hundred and ninety-one, the resolution passed on the 23rd day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company, to which the respondents except; and the City of Newport is ordered to continue to take gas from the said Company for the lighting of the places aforesaid as may be required for that purpose, according to the contract between the said City of Newport and the said Company, dated June third, 1880, to which said respondents except.

"And this proceeding is continued to the twenty-fourth day of July, 1891."

The Louisville Law and Equity Court refused an appeal from this judgment, and thereupon an appeal was asked of and granted by the Clerk of the Court of Appeals, and the judgment superseded.

The supersedeas was not recognized by the lower court, and upon the 20th of October, 1891, that court committed the defendants in error to jail for three months, but suspended the order until the twenty-fourth of that month, on which date it was the good fortune of these defendants that the Court of Appeals recognized the right to appeal by advancing the case, and overruling a motion to dismiss the appeal, after which the supersedeas was recognized. (For the order of commitment, see Appendix "F," p 45).

The Court of Appeals, on the 4th of March, 1893, rendered this judgment:

"The Court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefor considered that said judgment be reversed, and the cause remanded, with directions to discharge the rule herein, which is ordered to be certified to said court." (See page 89, printed record).

The opinion of the Court of Appeals will be found on page 46 hereof, Appendix "G."

The foregoing brief statement presents the history of the case so that the argument upon the motion may be readily understood.

ARGUMENT.

The final judgment in the suit of the Newport Light Company vs. the City of Newport was that rendered by the Louisville Law and Equity Court July 18th, 1885, and affirmed by the Court of Appeals of Kentucky May 20th, 1886, and this judgment gave the plaintiffs in error every and all relief they prayed for.

Their distress arises from their inability to enforce it.

Has the Supreme Court of the United States jurisdiction to compel a State Court to enforce its own judgments, especially when the method of enforcement refused is the extraordinary process of contempt? We submit that it has not.

The Act of Congress conferring jurisdiction upon this Court by appeal from, and writ of error to, the highest Courts in the several States, does so in suits wherein the judgment determined a Federal question adversely to the party complaining.

The proposition that an ancillary proceeding to enforce a judgment, begun by the filing of an affidavit, and the issuance of a rule to show cause why punishment for violating the judgment should not be inflicted, and ending in an order of commitment, is a suit within the meaning of the act, carries in the statement its refutation.

McMicken vs. Perrin, 20 Howard 133.

Callan vs. May, 2 Black 541.

Plaintiff in error might have filed a bill in equity against the defendant in error, the City of Newport, joining as defendant the Electric Light Company and had such a judgment as that if adverse, and because of a Federal question, a writ of error would go. It has not chosen to do so.

The researches of counsel for the defendants in error into the reported decisions of this Court have been unavailing to find an instance where jurisdiction has been entertained to inquire into the cause of the dismissal of a party from a charge of contempt.

Instances there are where conviction of contempt has been inquired into and adjudged wrongful, but what judicial tribunal will say that another must exercise this extraordinary power?

It may be said however, that the relief sought is that the Louisville Law and Equity Court be permitted, not compelled to punish for disobedience of its own judgment, but even so, the

whole matter is none the less an ancillary proceeding to enforce a judgment, and not a suit as contemplated in the act, and at best is but a regulation of practice in Kentucky.

The Court of Appeals of Kentucky has said that the rule, against the defendants in error, shall be discharged, and however much this Court may find that Court to have erred in the statement of the law that led it to its conclusion, yet the main question is, the enforcement of decrees of Kentucky Courts, a pure and simple question of practice, not a subject of consideration by this Court.

Counsel would now ask the consideration of the opinion of the Court of Appeals of Kentucky, delivered by Judge Pryor for the purpose of learning the scope and extent of the adjudication against plaintiff in error.

We understand the opinion to state as a principle of jurisprudence, that while the contracts of municipalities are as inviolable as those of individuals, when the subject matter of them is the furnishing of a public need or convenience, and progress in invention and art develop a new and superior method of supplying the need or convenience, if the municipality adopt it, and refuse compliance with its contract, the remedy thereon shall be at law for damages, and equity will deny specific performance in whatever form it is sought. (For the opinion see Appendix page 46.)

The Federal question which plaintiff in error asserts is presented, as we understand it, is that the two Acts of the Legislature of the State of Kentucky, the one incorporating the Suburban Electric Illuminating, Heating and Power Company, (see p. 42 hereof,) and the other the sixth section of the Act amending the charter of the City of Newport, (see p. 44 hereof,) were sustained against the objection that they impaired the obligation of the contract of June, 1880, between the plaintiff in error and the defendant in error, the City of Newport.

Answering we say that the opinion of the Court of Appeals of Kentucky expressly sustains the contract of June 1880, saying:

"The Company (plaintiff in error), has its legal remedy, and must resort to that remedy if it has sustained damages by reason of the refusal by the city to have its streets and public places lighted by gas. It is a right for the violation of which there is a remedy, but not to be enforced by the Chancellor to the detriment of the public interests."

It is pertinent here to make a short quotation from the petition to the Court of Appeals of Kentucky, filed by the plaintiff in error for a rehearing after a decision of the said Court had been rendered. It is "The final decision of this Court that the light company's only redress for the violation of the contract is by action at law for damages would certainly be in conflict with the judgment of the lower court in this case, perpetuating the injunction, and with the controlling decision of this Court affirming that judgment." (See page 96 in printed record).

Thus it appears that at the time of the filing of that petition, Counsel in the case were in accord as to the effect of the decision of the Court of Appeals of Kentucky.

The matter determined was, had the defendants in error disobeyed, the decree of July 18, 1885, perpetuating the injunction, and to answer this was propounded and answered the question. Did that decree go beyond a prohibition of taking gas from another than the plaintiff in error?

The language of the opinion on the subject is "the original action in this Court under which the injunction was made perpetual, was in reference to the supply of gas alone, and only considered in that light, and the word otherwise used in the restraining order by the judgment below, cannot be construed as giving to the Newport Light Company the absolute right to furnish gas and any other light during the existence of the contract."

Thus the decree, not extending to the act complained of, was not disobeyed.

To construe the decree, of course, involved no federal question; and the construction of the decree determining the case, whatever of federal question might be raised upon the effect of the legislative acts on the contract of plaintiff in error with the defendant in error, the City of Newport could be of no interest in this proceeding.

We speak but of one act of alleged disobedience, that of contracting for electric light, the other act, the declining to use gas light will, we assume, not be claimed to have been authorized or to have been upheld because of anything in either legislative act.

The Court of Appeals does not justify the city in this, on the contrary strongly intimates that it was a breach of its contract, but, as a matter of public policy, denies equitable relief, and leaves the matter to be settled at law.

The contract for the electric light was entered into because of the authority conferred by the two legislative acts referred to, and, but for them, could not have been made; but if the State Court determined that the contract, which it is claimed this authority impaired, did not, by its terms, extend to the subject matter of the new contract, then the federal question was not reached.

That such is the case the opinion of the Court of Appeals of Kentucky leaves no doubt. While the whole opinion and not a part is to be considered in determining what the dicision is, yet we venture this quotation as concluding the question: "Did that contract (the Gas Contract) by its terms give to the Newport Light Company the unlimited power over its streets for the purpose of lighting them for the period of twenty-five years from June, 1880? We think not,"

Upon the motion to affirm, we submit, that the proposition, that the public shall not be delayed in the enjoyment of the fruits of invention or science by improvident or illadvised contracts entered into by their representatives where the loss to the individual may be measured in damages, and which governed the Court of Appeals of Kentucky in its decision, is so eminently just, and so in accord with the decisions of this Court on the subject of the rights of those holding contracts with, and franchises from municipalities, as that this Court will affirm the judgment of the State Court upon motion.

WM. LINDSAY and
C. J. HELM,
Counsel for Defendants in Error.

APPENDIX "A."

An ordinance further providing for the lighting of the city of Newport, Ky.

SEC. 1. Be it ordained by the mayor and board of councilmen of the city of Newport: That from and after the passage of this ordinance there shall be and it is hereby granted unto the Newport Light Company and their successors, the exclusive privilege of using any or all of the streets, lanes, commons, alleys, and public places of the city for the purpose of laying pipes to convey and supply gas to the said city of Newport and others, this privilege is granted for the term of twenty-five years from the date hereof, and until the city shall give said company twelve (12) months' notice to terminate the same and embraces the right to said company to use said streets, lanes, alleys, and public grounds for establishing and conducting said business.

SEC. 2. That the said pipes etc. shall be so placed as not to interfere with the water, drain or sewer pipes of said city and whenever said light company or their successor shall desire to open any of said streets, lanes, alleys, etc. for the purpose of laying down pipes it shall be their duty to give at least five days' notice to the city previous to the commencement of the work. The company shall not during the progress of the work unnecessarily obstruct public travel, and shall within a reasonable time not exceeding thirty days after the pipes are laid in the streets etc. repair said streets in such manner as may be satisfactory to the city where the same have been disturbed by such work of the company, and that in case of settlement of said streets within sixty days thereafter, the said Newport Light Company shall repair and put the streets in same condition as before disturbed.

SEC. 3. The said Newport Light Company shall furnish to the city of Newport upon the several streets, lanes, alleys, and public places of the city of Newport in which pipes are laid, in continuous supply of gas (equal in quality to Cincinnati gas) in such quantities as the said city may require and direct for the use of the public street lamps and public buildings owned by the city or ordered by the Board of Councilmen at the rate of $1.20 per one thousand cubic feet, said Board of Councilmen shall detemine what size burners shall be used so that they shall not burn less than four

feet to the hour for each, and the lighting thereof shall be regulated in such manner as may from time to time be directed by the board of council of the city of Newport.

The amount of gas consumed by public street lamps and public buildings owned by the city to be ascertained by the customary meter measurement, gas shall be furnish to the citizens for their private consumption at the following rates, viz: At $1.90 per thousand cubic feet with 5 per cent off for cash within ten days for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet with 5 per cent off for cash within ten days for the period of five years from June 11, 1887; at $1.75 per thousand cubic feet with five per cent. off for cash with in ten days for the period of fifteen years from June 11th, 1892.

SEC. 4. That all public street lamps, lamp posts, and other requisite fixtures appertaining thereto shall be furnished by and at the expense of said Newport Light Company and erected at such times, points and in such numbers (where the main pipes are laid) as the city may direct, said lamps to be lighted upon their erection and continued in use thereafter as herein provided, and whenever the said city shall determine that a gas post shall be removed from one point to another or be discontinued, the said Newport Light Company shall remove the same *at the* expense of said city for such removal, and if discontinued, the same including requisite fixtures for the lamp post shall be purchased by said city at their original cost.

Public street lamps to be cleaned, lighted and kept in repair at the expense of said city and if said city should at any time desire to have public street lamps erected at any of the public buildings, or to light any street, lane, alley etc. and the said Newport Light Company should refuse to extend the pipes to such situations in the city, then the said city shall have the privilege of extending the pipes at their own cost, and to order the erection of such number of public street lamps for the purpose aforesaid, as they may deem proper and the said public street lamps shall be erected upon the same conditions and furnished with gas upon the same terms as the other public street lamps of the city, and the main gas pipes so laid down shall not directly or indirectly be used for furnishing gas except for public street uses, nor shall other pipes be laid down along any part of streets so occupied by gas pipes laid down at the expense of the city until the whole amount so expended by the city in laying down said pipes be refunded

to the city by said Newport Light Company and their successors, when the said pipes shall become the property of the said Newport Light Company, provided that the said company, if required or ordered so to do by said Board of Councilmen, shall lay down on such treet or streets *as* said board may designate not less than one thousand feet of gas pipe annually.

SEC. 5. And whereas the existing contract of the city of Newport with the Covington Gas Light Company will expire on the 11th day of June, 1882, and by the terms of said contract the city council or those with whom they may contract to light the city thereafter, may purchase the pipes, lamp posts and fixtures, etc., of the Covington Gas Light Company in the city, the value of the same to be determined as provided in the ordinance of June 11th, 1857, entitled An ordinance providing for the lighting of the city of Newport, Ky., with gas. Now, therefore, in consideration of the undertakings of the said Newport Light Company, as stipulated in this ordinance the said right of purchase with all the privileges incident or relating thereto *are* hereby assigned, transferred, and vested in said Newport Light Company in as full a manner as the same belongs to the city of Newport, and the city of Newport hereby guarantees to said Newport Light Company the accomplishment of said purchase and transfer, and the said company hereby binds itself in consideration of said transfer to make said purchase as aforesaid and the said Newport Light Company is to light the city thereafter according to the stipulations and provisions of this ordinance.

SEC. 6. The said Newport Light Company and their successors reserve and shall have the right to remove any or all of their pipes and lamp posts, fixtures, etc., when this contract expires, unless the same shall be removed, or the said city may purchase said pipes, lamp posts, fixtures, etc. The value of the same to be ascertained by five disinterested persons residents of Kentucky two of whom shall be chosen by the city, two by said Newport Light Company and the fifth by the four so chosen.

SEC. 7. Said company or their successors may adopt any other mode equal to gas for supplying light to the city and its inhabitants, etc., provided the same shall be done at no greater cost or expense to the city or consumers than the gas-light.

SEC. 8 The city is to pay in cash to said company for the gas consumed by it in the public lamps, public buildings and elsewhere as the quantity may be ascertained from the meters each month.

SEC. 9. The said Newport Light Company shall within fourteen days after the passage of this ordinance signify in writing its acceptance and thereupon the same shall become a binding contract between said company and the city, but upon failure of the company to accept the same then this ordinance may be repealed, provided further that said company shall within twenty days after the passage of this ordinance execute bond with good and approved surety to the said city for the faithful performance of all its duties as herein enjoined.

And the strict compliance with all the terms, conditions and requirements of this ordinace.

This ordinance shall take effect from its passage.

Passed June 3rd, 1880.

APPENDIX "B."

Whereas the Newport Light Company has voluntarily proposed to reduce the price of gas to private consumers to ($1.52) one dollar and fifty-two cents per 1,000 cubic feet from and after the first day of April, 1887, provided that the settlement of and the claims of said company against the city on the basis as heretofore proposed is effected:

Therefore be it resolved—

That the following basis of settlement, time-table, and proposed reduction of gas to private consumers be concurred in all agreed to by this board, and that the proper officers of the city are hereby directed to at once carry into effect all the provisions of said settlement.

SEC. 1. The city agrees to pay the Newport Light Company the amount of the judgment without interest and the bills of the Newport Light Co. which have accrued since to date, viz: February 1st 1887 without interest less ($1,000) one thousand dollars, payments to be made of ($1,000) on each month until total is paid without, interest. The first payment to be made on the first day of April, 1887.

It is agreed that the amount of judgment is	15,589 89
Less poor-house farm levied on and brought	1,500 00
Leaving a net balance of	14,089 89
To which add amount of gas bills &c. as above up to February 1st, 1887 less ($1,000) one thousand dollars	11,431 61
Making total indebtedness	25,521 50

SEC. 2. The city agrees to dismiss the appeal in the Court of Appeals each party to pay its own costs.

SEC. 3. The Light Company to stay the attachment in the Campbell Chancery Court which was brought to enforce collections of the above judgment until such time as the claims now pending and due are paid in conformity with the agreement when the Light Company is to release the attachment.

SEC. 4. The Light Company upon settlement of the claims as above agrees to release and cause to revert to the city the poor-house farm if the city so desires upon payment by said city to said Light Company of the exact amount paid by said Light Company for said farm.

SEC. 5. The city agrees to instruct the city engineer or other city officials to see that the meters in the public buildings and on the lamp posts are correct and that on the last day of each month to further see that the statements of the same are properly taken by the Light Company and to verify the bills of said company. Said bills to be referred to him for that purpose.

SEC. 6. The Light Company to concede the right of the city under the contract to designate the size of the burners not however to be less than (4) four-foot burners.

SEC. 7. The lighting and extinguishing of the public street lamps in the future shall be governed by the following time-table:

Month.		Begin to light.	Begin to extinguish
Jan.	1st to 10th	5 p. m.	6 a. m.
"	11th " 20th	5.15 "	6 "
	21 " 31st	5.30 "	6 "
Feb.	1 to 10	6 p. m.	6 "
	11 " 20	6 "	5.45 "
	21 " 28	6.15 "	5.30 "
March	1 " 10	6.30 "	5.15 "
	11 " 20	7 "	5 "
	21 " 31	7 "	5 "
Apr.	1 " 10	7.30 "	4.45 "
	11 " 20	7.30 "	4.30 "
	21 " 30	7.45 "	4 "
May	1 " 10	7.45 "	4 "
	11 " 20	7.45 "	3.45 "
	21 " 31	7.45 "	3.30 "
June	1 " 10	8 "	3 "
	11 " 20	8 "	3 "
	21 " 30	8 "	3 "
July	1 " 10	8 "	3 "
	11 " 20	8 "	3 "
	21 " 31	7.45 "	3 "
Aug.	1 " 10	7.30 "	3.30 "
	11 " 20	7.15 "	4 "
	21 " 31	7 "	4.15 "
Sept.	1 " 10	6.45 "	4.15 "
	11 " 20	6 30 "	4.30 "
	21 " 30	6.15 "	4.45 "
Oct.	1 " 10	6.15 "	4.45 "
	11 " 20	6 "	5 "
	21 " 31	5.45 "	5.15 "
Nov.	1 " 10	5.30 "	5.30 "
	11 " 20	5.30 "	5.30 "
	21 " 30	5.15 "	5.45 "
Dec.	1 " 10	5 "	6 "
	11 " 20	5 "	6 "
	21 " 31	5 "	6 "

No lighting on night of full moon and two nights before and two nights after full moon except in case of rainy or very cloudy weather.

The amount of gas consumed to be paid for by meter measurement and that when the city shall determine that a gas post shall be removed from one point to another or to be discontinued, the gas company shall remove the same at the expense of the city and if discontinued the same including the requisite fixtures for the posts shall be purchased by said city at their original cost.

SEC. 8. Said Newport Light Company for the purpose of meeting the views of many of its customers voluntarily propose that from and after the first day of April, 1887 for the following five years will reduce the price of gas to ($1.60) one dollar and sixty cts. per 1,000 cubic feet with five per cent. off for cash if paid within ten days after the first day of each month, making the net cost ($1.52) one dollar and fifty-two cts. per (1,000) one thousand cubic feet but this action of said company shall not be understood or made use of in any way to effect the existing contract of said company with the city of Newport and to be construed as a voluntarily act on the part of said Light Co., and it is hereby understood and agreed that said voluntary act of the said Newport Light Co. does not waive any existing rights or privileges granted them in their existing contract.

Accepted by

NEWPORT LIGHT COMPANY,
By JOHN A. WILLIAMSON, *President.*

Witnessed by—
M. J. COSTIGAN.
LOUIS CONSTANS.

APPENDIX "C."

Whereas the streets and public places of the city of Newport, Kentucky, are now being lighted by gas furnished by the Newport Light Company in lamp posts owned by the said Newport Light Company; and whereas, under the terms of the contract between the said city and said light company, said city may discontinue said lamp posts by paying to said light company the original costs of the lamp posts, including its requisite fixtures; and whereas the said city of Newport is desirous of using electric lights in said streets and public places of the city at approximately the same cost to the city as the gas light would be:

And whereas the Suburban Electric Illuminating, Heating and Power Company of Newport, Kentucky, is desirous of furnishing the said city with electric light, and is willing to assume the payment of the contract price for the lamp posts and their requisite fixtures that may be discontinued and take the same, and to save and hold the city harmless from the costs and expenses, including lawyers' fees, of any and all suits or actions at law or in equity that may be instituted against it by reason of the execution by it of this contract, and is also willing to supply said electric light at approximately the same cost as gas-light would be under its present contract, the average cost of which for the last five years has been over twenty dollars per lamp post, which is equal to one hundred dollars per year per 2,000 C. P. arc light, one of which displaces five lamp posts, at which price the said Suburban Company is willing to furnish the light, turning it on and off according to the schedule now in force with the Newport Light Company:

Now, therefore, this contract, entered into this 23rd day of April, 1891, by and between the city of Newport, a municipal corporation in the county of Campbell and State of Kentucky, party of the first part, and the Suburban Electric Illuminating, Heating and Power Company of Newport, Campbell county, Kentucky, a corporation created by an act of the General Assembly of said State, party of the second part witnesseth:

That the party of the second part, for and in consideration of the covenants and agreements of the party of the first part, does hereby agree, contract, and covenant to and with the party of the first part that it will:

First. At and for the price and cost hereinafter agreed to be paid by the party of the first part, erect, maintain, clean, repair, light or turn on, and extinguish or turn off one hundred and five electric arc lights of 2,000 C. P. (commercial) each at the places in the party of the first part, indicated by the stars on the hereunto attached map on the plat of said party of the first part; which map or plat is made a part of this contract as fully as if incorporated herein, and is identified by the signatures and seals of the parties hereto, and also furnish current of electricity sufficiently to keep them continuously lighted.

The light shall be turned on and off as follows:

	Turn on.	Turn off.
January 1st to 10th, inclusive	5.00 p. m.	6.00 a. m.
" 11th to 20th, "	5.15 "	6.00 "
" 21st to 31st, "	5.30 "	6.00 "
February 1st to 10th, "	6.00 "	6.00 "
" 11th to 20th, "	6.00 "	5.45 "
" 21st to 28th, "	6.15 "	6.30 "
March 1st to 10th, "	6.30 "	5.15 "
" 11th to 20th, "	7.00 "	5.00 "
" 21st to 31st, "	7.00 "	5.00 "
April 1st to 10th, "	7.30 "	4.45 "
" 11th to 20th, "	7.30 "	4.30 "
" 21st to 30th, "	7.45 "	4.00 "
May 1st to 10th, "	7.45 "	4.00 "
" 11th to 20th, "	7.45 "	3.45 "
" 21st to 31st, "	7.45 "	3.30 "
June 1st to 10th, "	8.00 "	3.00 "
" 11th to 20th, "	8.00 "	3.00 "
" 21st to 30th, "	8.00 "	3.00 "
July 1st to 10th, "	8.00 "	3.00 "
" 11th to 20th, "	8.00 "	3.00 "
" 21st to 31st, "	7.45 "	3.00 "
August 1st to 10th, "	7.30 "	3.30 "
" 11th to 20th, "	7.15 "	4.00 "
" 21st to 31st, "	7.00 "	4.15 "
September 1st to 10th, "	6.45 "	4.15 "
" 11th to 20th, "	6.30 "	4.30 "
" 21st to 30th, "	6.15 "	4.45 "
October 1st to 10th, "	6.15 "	4.45 "
" 11th to 20th, "	6.00 "	5.00 "
" 21st to 30th, "	5.45 "	5.15 "
November 1st to 10th, "	5.30 "	5.30 "
" 11th to 20th, "	5.30 "	5.30 "
" 21st to 30th, "	5.15 "	5.45 "
December 1st to 10th, "	5.00 "	6.00 "
" 11th to 20th, "	5.00 "	6.00 "
" 21st to 31st, "	5.00 "	6.50 "

except on nights of full moon and two nights before and two nights after said nights, when it will not be turned on unless

rainy or very cloudy weather, when the schedule will be observed. The chief of police of the party of the first part or such other officer of the party of the first part as it may from time to time indicate shall be the judge of whether it is rainy or very cloudy weather, and upon his notice to the party of the second part that it is necessary the party of the second part shall turn on the lights according to the schedule, and if not so turned on after such notice there shall be a deduction in the rate per month for the hours the lamps should per schedule be giving light, to be deducted from the next monthly bill.

Second. Take, remove, and pay for all the lamp posts, including their requisite fixtures, in use for lighting the streets and public places in the party of the first part, belonging to the Newport Light Company, which the party of the first part may discontinue.

Payment shall be made to the party of the first part by the party of the second part in such amounts and at such times as it may be required to pay the said Newport Light Company for the lamp posts so discontinued, and the lamp posts shall be removed at the sole cost of the party of the second part and become the property of the party of the second part.

Third. Pay all costs of court and expenses, including attorney's fees, in any action and suits that may be instituted by the Newport Light Company against the party of the first part which may be caused by the execution of the contract by the party of the first part. The attorneys, however, who are thus to be paid are to be selected by the party of the second part.

Fourth. Change the location of any of the arc lights supplied by the party of the second part as may be directed by the party of the first part, without cost or expense to the party of the first part, and also to furnish all additional arc lights which the party of the first part may order or direct, which shall be 2,000 C. P. (commercial) and shall be erected, maintained, repaired, cleaned, supplied with electric current, and turned off and on as those herein contracted for and at no greater cost.

Fifth. Execute with good and approved security a bond in the penal sum of ten thousand dollars, conditioned for the faithful performance of this contract.

And the party of the first part, for and in consideration of the covenants and agreements of the party of the second part, does hereby agree, contract, and covenant to and with the party of

the second part that it will promptly at the end of each and every month pay to the party of the second part the sum of eight $\frac{33}{100}$ dollars for each arc light herein contracted for and erected and in use in the said party of the first part, less a reduction at the same rate for the time any lamp fails to furnish light during the hours required by the schedule hereinbefore set forth.

It is mutually agreed that this contract is to continue in full force for the full term of fifteen years from the date hereof, and that all the arc lamps indicated on the hereunto attached plat or map are to be furnishing light on or before the first day of July next, unless enjoined from so doing; in which instance in sixty days after the final dissolution of the injunction.

In witness whereof the party of the first part, by its mayor, and pursuant to the resolutions of the Board of Councilmen and the party of the second part, by its president, and pursuant to the resolutions of its board of directors, have hereunto set their names and affixed their seals the day and year first above written.

SUBURBAN ELECTRIC ILLUMINATING,
HEATING AND POWER COMPANY,
By H. M. HEALY, *President.* (*Seal.*)
THE CITY OF NEWPORT,
By A. S. BERRY, *Mayor.* (*Seal.*)

APPENDIX "D."

Louisville Law and Equity Court.

NEWPORT LIGHT CO.
vs.
CITY OF NEWPORT
} Consolidated Cases.
DUEBER LIGHT CO.
vs.
NEWPORT LIGHT CO.

Affidavit.

John A. Williamson says he is the president of the Newport Light Company, and that on the 23d day of April, 1891, the city of Newport, by its mayor and Board of Councilmen, made and entered into a contract with the Suburban Electric Illuminating, Heating and Power Company, by which the said company undertook and agreed to light the streets, alleys, and public places in said city with electricity for the term of fifteen (15) years, and the city agreed to pay for the same at the prices set forth in said contract, a certified copy of which is filed herewith as part hereof, marked "A," and he says that on the 23d day of April, 1891, the said mayor and Board of Councilmen passed a resolution declaring that the city of Newport would "discontinue the use of lamp posts now in use for both gas and gasoline, and the lights thereby furnished on and after July 1st, 1891," and that the city clerk be directed to notify the Newport Light Company thereof, a certified copy of which resolution is filed herewith, marked "B."

Affiant says that in pursuance of said resolution the city clerk did, on the 29th day of April, 1891, notify the Newport Light Company of the passage of the same and requested the said light company to send the city a statement of the original cost of its lamp posts, including the requisite fixtures therefor. He says that on the 1st day of July, 1891, the said Electric Illuminating, Heating and Power Company commenced to furnish electric light under said contract, and is still furnishing

the same, and that on the 30th day of June, 1891, the city of Newport attempted to tender to the Newport Light Company the sum of nine thousand four hundred and five ($9,405), dollars which said city claims was the original cost and value of the lamp posts and fixtures belonging to the Newport Light Company, but which affiant says was not and is not the true value thereof. Affiant says that the said city of Newport is, by reasons aforesaid, attempting to annul and set aside the contract made between said city and the Newport Light Company on the ---- day of June, 1880, on file in these causes, and is threatening to discontinue the use of gas and gasoline under said contract or to pay for the same, although the said Newport Light Company has complied in every respect with all the terms and conditions of said contract, and is still doing so, all of which affiant says is in violation of the perpetual injunction granted in these actions and in contempt of the authority of this Court. Affiant says that A. S. Berry was at the time said contract was made with the said Suburban Electric Illuminating, Heating and Power Company, and is now, mayor of the said city of Newport, and the following named persons were then and ever since then have been and are now members of the Board of Councilmen, to wit, William Cassidy, James E. McCracken, John Halloran, Michael Donelan, Edward Enneking, George Tippenhauer, John Schnorr, James Knobloch, B. W. Keim, Philip J. Ryan, James Smith, James Dunnigan, John G. Wall, and J. H. Egelston. And the Newport Light Company prays that a rule be forthwith issued against all such parties requiring them to show cause why they and each of them should not be attached and punished for a contempt of this Court.

John A. Williamson says that he is the president of the Newport Light Company, and that the statements contained in the foregoing affidavit are true.

JOHN A. WILLIAMSON.

Sworn to before me by John A. Williamson this 6th day of July, 1891.

HENRY E. YOUTSEY,

Examiner in and for Campbell Co., Ky.

APPEDNIX "E."

Louisville Chancery Court.

NEWPORT LIGHT CO., Plaintiff,
vs.
CITY OF NEWPORT *et al.*, Defendants. } Consolidated Cases.

Response to Rule.

For response to the rule herein issued the 7th day of July, 1891, the City of Newport and the mayor and members of the Board of Councilmen thereof respectfully disclaim unto the court that the matters and things specified in the affidavit filed herein July 7, 1891, or any of them are in violation of the perpetual injunction granted in these actions or in contempt of the authority of the Court, and the respondent saith:

1. That the Newport Light Co. did not in these actions or either of them complain of any threat of infringement upon its alleged right except by contract with other then existing persons or corporations to supply light to said city by means of gas.

2. That these respondents were not enjoined from making any contract for lighting except during the existence of the contract then in force with the Newport Light Co.

4. That they were enjoined from discontinuing the taking of gas from the Newport Light Co. for the lighting of said places only as to such quantities as might be required for that purpose according to the contract then in force between said parties. They say that from and after the first day of July, 1891, no gas was required for that purpose either according to said contract or otherwise.

5. That as to such discontinuance they were enjoined only for so long as said contract should remain in force.

6. That before the 19th day of March, 1887, the Newport Light Co. had brought its suit against the city of Newport in the Campbell Circuit Court to recover for the furnishing of lights to the streets, alleys, and other public places of said city and had recovered therein a judgment for $15,589.89, and in said action it was in issue, among other things, between said parties whether said city might lawfully discontinue the taking of gas from the Newport Light Co. either with or without paying the original cost of each lamp post, including requisite fixtures of same, furnished according to said contract, and whether the gas furnished by

the Newport Gas Co. was equal in quality to Cincinnati gas; that said judgment had not been paid except as to $1,500.00 thereof, which was realized by execution sale of the said city's poor-house farm, and has been appealed from by said city, and said issues were on said day pending in the Court of Appeals and undetermined; that on said day it was by said city, through its Mayor and Board of Councilmen, and by the Newport Light Co., in compromise and settlement of all claims and litigation between said city and the Newport Light Co., contracted and agreed among other things, that said city would pay the amount of said judgment without interest, and the subsequently accrued bills of said Light Co. to Feb'y 1, 1887, without interest, and less $1,000.00, being a total of $25,521.50 payable in monthly installments of $1,000.00 each, and that the city should dismiss said appeal, and that the lighting and extinguishing of the public street lamps thereafter (but without fixing any term) should be governed by a certain time-table therein set forth, and that when said city should determine that a gas post should be discontinued the same, including the requisite fixtures for the posts, should be purchased by said city, at their original cost; and respondents file herewith as part hereof a copy of said contract, and respondents say the said new contract was in force from said day until the doing of the several acts now complained of and was in lieu of the original contract wherein said injunction was decreed, and was a novation of the rights between said parties as to the lighting and discontinuance of lamp posts and lights.

7. Respondents further say that after the original power of the said city to provide for lighting was exhausted, as in these causes determined, and after said decree and after said substituted contract was made the General Assembly by an act entitled "An act to amend the charter of the city of Newport," approved the 17th day of April, 1890, invested said city with full power and authority to provide for lighting its streets, &c., in any manner whatsoever; and the General Assembly by a certain other act, entitled "An act to incorporate the Edison Electric Illuminating, Heating and Power Co.," approved the 9th day of April, 1890, and the amendatory act approved the 15th day of May, 1890, to said act, changing the name from "Edison" to "Suburban," incorporated said company and conferred upon it power and authority to enter in and upon the streets and public places of the said city of Newport, and therein erect poles and stretch wires upon the same along said streets for the purpose of supplying

electric light, heat, and power to such persons and corporations, including the city of Newport, as might contract with it for same.

8. That the action of the city in making the contract with the Suburban Illuminating, Heating and Power Co., the passage of the resolution to discontinue the lamp posts, and the tender of the said $9,405.00 which are set forth in the affidavit of Jno. A. Williamson, filed herein, were done under the said acts of the legislature and the contract between the Newport Light Co. and the city of Newport.

Wherefore respondents ask that the rule against them be discharged and that they be exonorated from the charge of contempt of this Honorable Court, and that they have judgment against the Newport Light Co. for their costs herein expended.

THOMAS P. CAROTHERS,
T. F. HALLAM,
JOHN P. NEWMAN,
THOMAS F. HARGIS,
C. J. HELM,
Attys for Respondents.

The affiants, Albert S. Berry, William Cassidy, James E. McCracken, John Halleran, Edward Enneking, James Knoblaugh, Phillip J. Ryan, James Dunnigan, John G. Wall, and J. H. Eggelston say that each and all of the allegations and statements in the foregoing response are true.

ALBERT S. BERRY.
WM. CASSIDY.
J. E. McCRACKEN.
JOHN HALLERAN.
JAMES KNOBLAUGH.
PHIL. J. RYAN.
JAMES DUNIGAN.
JOHN G. WALL.
J. H. EGGELSTON.
EDWARD ENNEKING.

Subscribed and sworn to before me by all of the above-named parties this 13th day of July, 1891.

JAS. W. GARRISON,
Notary Public, Jeff. Co. Ky.

Subscribed and sworn to by J. H. Egleston, before me this 13 day of July, 1891.

JOHN M. O'NEILL,
D. Ct'k Louis. Ch'y Ct.

The original petition of The Newport Light Co. *vs.* City of Newport, (1607, filed on the 19th day of February, 1885, is in the words and figures as follows, to-wit:

Campbell Chancery Court.

THE NEWPORT LIGHT COMPANY, Plaintiff,
vs.
THE CITY OF NEWPORT, Defendant. } Petition in Equity.

The plaintiff says that it is a body corporate and politic under the laws of this State, with power, among other things, to sue and be sued, contract and be contracted with, and to furnish any city, town, district, corporation, public institution, manufacturing establishment, or private premises with gas or other light for such time and upon such terms as may be agreed upon by the parties, and, for the purposes of their business, to acquire by purchase or other lawful mode such property, real or personal, as it might require in its business and to dispose thereof.

It says that the def't is a municipal corporation under the laws of this State, and with authority under the charter to provide for the lighting of its streets, lanes, commons, alleys, and public buildings or places with gas, that in virtue thereof the def't on the 3rd of June, 1880, made and entered into a contract with pl't'ff whereby it was mutually stipulated, covenanted, and agreed, among other things not material to be here noticed, that from and after the 11th day of June, 1882, the pl't'ff and its successors should have the exclusive privilege of using any or all of the streets, lanes, commons, alleys, and public places of said city for the purpose of laying pipes to convey and supply gas to it and others, said privilege to be so enjoyed and used for the term of twenty-five years from June 11th, 1882, and until the def't should give pl't'ff twelve months' notice to terminate same, and expressly embracing the right of pl't'ff to use said streets, lanes, alleys, and public places or grounds for establishing and conducting said business; that pl't'ff should furnish to def't, upon its several streets, lanes, alleys, and public places in which pipes were so laid, a continuous supply of gas, equal in quality to Cincinnati gas, in such quantities as the def't might require and direct for the use of the public street lamps and public buildings owned by it or ordered by the Board of Councilmen, at the rate of one and $\frac{20}{100}$ dollars per one

thousand cubic feet; the said Board of Councilmen should determine what sized burners should be used, so that they should not burn less than four feet to the hour for each, the lighting of same to be regulated in such manner as might from time to time be directed by said Board of Councilmen; that the amount of gas consumed by said street lamps and public buildings owned by def't should be ascertained by the customary meter measurements; that gas should be furnished to the citizens of de'ft city for their private consumption at the rates as follows, to-wit, at $1.90 per thousand cubic feet, with five per cent off for cash within ten days, for the period of five years from June 11th, 1882; at $1.80 per thousand cubic feet, with five per cent. off for cash within ten days, for the period of five years from June 11th, 1887; at $1.75 per thousand cubic feet, with five per cent off for cash within ten days for the period of fifteen years from June 11th, 1892; that all public street lamps, lamp posts, and other requisite fixtures appertaining thereto should be furnished by and at the expense of plt'ff and erected at such times, points, and in such numbers where the main pipes were laid as the def'd't might direct; that the same should be lighted upon their erection and continued in use thereafter as in said contract provided; that when def'd't should determine that a gas post should be removed from one point to another or be discontinued the pl't'ff should remove same at def't's expense for such removal, and, if discontinued, the same, including requisite fixtures for the lamp post, should be purchased by def'd't at their original cost; that public street lamps should be cleaned, lighted and kept in repair at def't's expense, and if def'd't should at any time desire to have public street lamps erected at any public buildings or to light any street, lane, alley, etc., and pl't'ff should refuse to extend the pipes to such points in def'dt city, then the latter should have the privilege of extending said pipes at its own cost and to order the erection of such number of public street lamps for the purpose aforesaid as it might deem proper, the same to be erected upon the same conditions and furnished with gas upon the same terms as the other public street lamps of the city, the main gas pipes so laid down not to be used, directly or indirectly, for furnishing gas except for public street uses, nor other pipes to be laid down along any part of the streets so occupied by gas pipes laid down at the def'd't expense until the whole amount so expended by def'd't in laying down said pipes be refunded to def'd't by pl't'ff, and its successors, when pipes should

become the property of pl't'ff provided that pl'tff, if required or ordered so to do by def't's said Board of Councilmen, should lay down on such street or streets as said board might designate not less than one thousand feet of main gas pipe annually; that inasmuch as the then existing contract between the def'd't and the Covington Gas Light Company would expire on the 11th day of June, 1882, and that by the terms of same by the city council of def'd't or those with whom they might contract to light def'd't city thereafter might purchase the pipes, lamp posts, fixtures, etc. of said Covington Gas Light Company in def'd't city in accordance with a valuation thereof to be determined as provided in a certain ordinance bearing date the 11th day of June, 1857, entitled An ordinance providing for the lighting of the city of Newport; Kentucky, with gas, and therefore, in consideration of the undertakings of pl't'ff in said contract of June 3rd, 1880, the said right of purchase, with all privileges incident or relating thereto, were by def'd't in its said contract assigned, transferred, and vested in pl't'ff in as full a manner as they belonged to def'd't, the latter therein guaranteeing to pl't'ff, in the accomplishment of said purchase and the transfer, and the pl't'ff, in consideration thereof, therein binding itself to make said purchase, as aforesaid, and to light the def'd't city thereafter according to the stipulations and provisions of said contract, that pl't'ff and its successors reserved and should have the right, upon the expiration of said contract, to remove any or all its pipes, lamp posts, fixtures, etc., unless said contract should be renewed, or def'd't might purchase said pipes, lamp posts, fixtures, etc., the value thereof to be ascertained by five disinterested persons, residents of Kentucky, two of whom should be chosen by def'd't, two by plaintiff, and the fifth by the four chosen; that for the gas consumed by it in the public lamps, public buildings, and elsewhere, as the quantity might be ascertained from the meter each month, the def'd't should pay cash to the pl't'ff, and, finally, that pl't'ff should, within fourteen days from the date aforesaid, to wit, June 3rd, 1880, signify in writing its acceptance of said contract; whereupon the same should "become a binding contract" between pl't'ff and defendant, it being further provided that within twenty days from said date pl't'ff should execute bond, with good and approved security, to de'fd't for the faithful performance of all its duties, as in said contract enjoined and stipulated, and for a strict compliance by pl't'ff with all the terms, conditions, and requirements of same.

And pl't'ff says that said contract, according to the tenor and effect aforesaid, was embodied and embraced in an ordinance duly and regularly passed by the Mayor and Board of Councilmen of def'd't on the date aforesaid, which by its terms took effect from its passage. A true copy of said ordinance, entitled "An ordinance further providing for the lighting of the city of Newport, Ky.," is herewith filed and made a part hereof, marked Exhibit "A."

Pl't'ff says that within fourteen days from and after the passage thereof, as aforesaid, it signified, in writing, its acceptance of said contract, as provided therein, and that within twenty days from and after said date it executed and delivered to def'd't its bond, with good and approved security, for the faithful performence of all and singular its duties under said contract, as therein enjoined, and for a strict compliance with all the terms, conditions, and requirements thereof; which bond was duly accepted by def'd't. And pl'tff says that thereafter, to wit, upon the—day of——, 188-, it entered in good faith and with all proper diligence upon the performance of all and singular its duties under said contract, according to the terms and conditions thereof; that in so doing it has necessarily made great and burdensome outlays and expenditures in money and material, amounting in the aggregate to more than one hundred thousand dollars; that it has likewise and of necessity expended great labor and been put to much trouble and pains in the due and proper performance of its several covenants aforesaid; that, relying thereupon, it has, in the utmost good faith and in the determination to fully perform its said undertakings, purchased from said Covington Gas Light Company, as provided in said contract, its pipes, lamp posts, fixtures, etc., at great expense, to wit, nearly sixty thousand dollars; that its additions thereto under said contract have been made at a cost of more than forty thousand dollars; that these large sums have been necessarily expended under said contract and in reliance thereupon by pl't'ff, as def'd't well knew at the time thereof and with its approval; that it has ever since duly and regularly proceeded, with def'd't's knowledge and consent, in the execution of said contract, and has at all times furnished def'd't with gas, as therein provided; that it is still ready, willing, and able to furnish same to def'd't in such quantities as it may require and in all respects to further perform and execute said contract in all

its requirements ; of all which def'd't has full knowledge. But pl't'ff says that the def'd't, wholly ignoring and disregarding the provisions of its said contract and for the purpose of annoying and harrassing pl't'ff, has recently been and still is making attempts to enter into a similar contract with other persons and companies, against the protest of this pl't'ff ; that, to this end, on or about the—day of January, 1885, pursuant to a resolution of its Board of Councilmen, it advertised for proposals for the lighting of the public highways, &c., for the term of—years from the 8th Febuary, 1885, "or as soon thereafter as the same can be done." A copy of said resolution is herewith filed as a part hereof, marked Exhibited "B."

Pl't'ff says that on the 6th day of February, 1885, pursuant to a resolution passed by the city council of def'd't on the preceding day, it was notified by def'dt's committee on gas and its official attorney that its contract with def'd't was at an end on the 8th day of February, 1885. Said resolutions and notice are herewith filed, marked Exhibit "C." And pl't'ff says that on the 10th day of February, 1885, pursuant to a resolution passed by the Board of Councilmen of def'd't on the preceding day, it was notified by def'd't that, among other things, there was, in the judgment of said board, no existing contract between pl't'ff and def'd't for the furnishing of gas for lighting the streets, lanes, alleys, or public places of def'd't city; that the def'd't had not directed or required the furnishing the supply of gas for that purpose, and "does not now do so with any reference to any pre-existing contract, and that for any gas which may hereafter be furnished it may be done without reference to any former contract, and which either party is at liberty to discontinue at their option without notice."

Said resolution and notice are herewith filed, marked Exhibit "D."

And pl'ff says that thereupon it notified def'd't that it relied upon the contract aforesaid and would continue to furnish gas, etc., as it was then doing under and pursuant to said contract and not otherwise ; that the def'd't nevertheless, still disregarding its said contract and determined with purpose as aforesaid and in bad faith to violate same, has continued and is still continuing its efforts to make a contract with other persons for the lighting of its streets, alleys, lanes, and public places, and is threatening to do so at the next meeting of its Board of Council-

men; that to that end its arrangements are either perfected or are being perfected for the final consummation thereof at its next meeting, as aforesaid, and that unless restrained and inhibited from so doing the def'd't will speedily, in bad faith and in violation of the terms and meaning of said contract, make a new contract with some other person, company, or corporation for the lighting of its streets, etc., as aforesaid; that it is likewise def'd'ts purpose to discontinue the taking of gas from pl't'ff and to take same from other parties, as well as to grant to the latter the privilege of furnishing same to private consumers; that by reason thereof pl't'ff will be made to suffer great and irremediable loss and injury.

Wherefore pl't'ff prays that an order of injunction issue directed to the def'd't, its officers and agents, and to said Board of Councilmen, strictly enjoining and restraining them and each of them from making any contract with any persons, company, partnership, or corporation for the lighting of def'd't's streets, lanes, alleys, or public buildings or places, and from discontinuing the taking of gas from pl't'ff for the lighting of said places in such quantities as it may require, and for all such further relief as pl't'ff may in equity be entitled to.

NELSON & WASHINGTON,

Att'ys for Pl't'f.

John A. Williamson says that he is the president of The Newport Light Company, pl't'ff in the forgoing petition; that the statements therein contained are true, as he believes; that the injunction therein prayed for has not been refused by the Court or by any Circuit Judge, and that irreparable injury will result to said pl't'ff company if said injunction be not immediately granted.

JOHN WILLIAMSON.

Sworn to and subscribed before me by said John A. Williamson, president of the Newport Light Company, this 19th day of February, 1885.

JOHN C. SCHROLL, *Cl'k.*

STATE OF KENTUCKY, } *set*:
Campbell County, }

To the city of Newport, its officers, agents, &c.:

You are hereby enjoined and restrained from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings or places of the city of Newport with gas or otherwise and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places in such quantities as may be required for that purpose until the further orders of this Court.

Given under my hand this 19th day of February, 1885.

JOHN C. SCHROLL,
Clerk Campbell Chancery Court.

Opinion by Judge Simrall.

Louisville Law and Equity Court.

NEWPORT LIGHT CO., Plaintiff, }
vs. }
CITY OF NEWPORT, Defendant }

and

DUEBER LIGHT CO., Plaintiff, }
vs. }
NEWPORT LIGHT CO., Defendant. }

These actions were transferred to this Court from the Campbell Chancery Court. They involve substantially the same questions and were heard together. On the 17 Feb'y 1874, the legislature of Kentucky passed "an Act to revise and amend the charter of the city of Newport."

By the 6th sec. of said act the city of Newport was given power "to construct, maintain, and operate gas and water works and to pass all ordinances necessary to regulate the same, provided that no existing contracts shall be affected thereby." See Acts 1873–'5, p. 333.

In 1879–'80 the Newport Light Company was incorporated by act of the legislature and was empowered to "furnish any city, town, district, corporation, or locality or any public institution, manufacturing establishment, or private premises with gas or other light for such time and on such terms as may be agreed upon by the parties."

In pursuance thereof the Newport Light Company entered into a contract (by ordinance) with the city of Newport in 1880, by which, amongst other things, it was stipulated that the Newport Light Company should have the exclusive privilege of using any and all streets, lanes, commons, and alleys and public places of said city for the purpose of laying pipes to convey and supply gas to it and others, said privilege to be so enjoyed and used for the term of twenty-five years and until the city should give said company twelve months' notice to terminate the same; that said company should furnish the city of Newport upon its several streets, alleys, and public places in which pipes were so laid a continuous supply of gas equal in quality to Cincinnati gas, in such quantities as the city might require and direct for the use of the public street lamps and public buildings owned by it or ordered by the Board of Councilmen at the rate of one and $\frac{20}{100}$ dollars per thousand cubic feet.

There are many details to said contract, which further provides for furnishing gas also to the citizens on terms named, and also for the purchase by said Newport Light Co. of the pipes, lamp posts, fixtures, &c., of the Covington Gas Light Company and then for the purchase of said property by the city of Newport from the Newport Light Company in certain contingencies upon the terms and conditions in said contract specified.

Accordingly the Newport Light Co. entered upon the execution of said contract and expended in so doing over one hundred thousand dollars in the purchase of property, making extensions, laying pipe, &c.

In February, 1885, "the Dueber Light Company" was incorporated by recording articles in the county clerk's office of Campbell county under the general laws of the State of Kentucky, with "power to contract with and supply to the citizens and inhabitants of the city of Newport gas for illuminating and other purposes and to have, own, hold, and maintain all pipes, property, and fixtures necessary for said purposes."

Some time thereafter the Dueber Light Co. applied to the mayor and common council of Newport for permission to lay pipes in the streets of the city for the purpose of supplying gas to its citizens in manner aforesaid, which license was granted, and it is claimed that the city of Newport was proceeding to make a contract with the Dueber Light Co. to furnish gas to the city in disregard of its prior contract with the Newport Light Co. for the same purpose. There was an abortive effort to make a new contract with the Newport Light Co. Thereupon this litigation ensued. The Newport Light Co. in the action against the city of Newport seeks to enjoin the city from making or executing such new contract. The Dueber Light Co. in the action against the Newport Light Company seek to enjoin the latter from claiming or asserting any exclusive right or privilege to the use of the streets, alleys, or public places of the city of Newport for the purpose of laying down or maintaining pipes and other fixtures to supply gas to the citizens and inhabitants of said city for twenty-five years or any other time.

In this action the Newport Light Co. makes its answer a counterclaim against the plaintiff, Dueber Light Co., and a cross-petition against its codefendant, the City of Newport, and prays that the Dueber Light Co. be enjoined from laying any gas pipes, &c., in the streets, &c., of Newport, and that the city of Newport be enjoined from taking any steps towards conferring such power upon said company, and that the city be further enjoined from making any contract with said company looking to that end or in violation of the rights of the Newport Light Company.

It will thus be seen that the foundation of this controversy is the right to lay gas pipes in the streets and other public places of the city of Newport.

We will consider the legal right of the parties seperately, and when they are ascertained it will not be difficult to apply the remedy:

I.

What right has the Dueber Light Company to lay gas pipes in the streets of Newport? None whatever in the opinion of the Court. It is a corporation, as exhibited on the face of its pleading, created not by acts of the legislature, but under the general incorporation laws of the State.

The general statutes, chap. 56, under which this corporation was organized, expressly provides that "such incorporation shall confer no powers or privileges not possessed by natural persons except as therein provided."

Nothing is therein provided which takes such a corporation as the Dueber Light Co. from under the operation of that statutory requirement.

It is certain, then, that the act of incorporation did not and could not confer upon that company the right to lay gas pipe in the streets of Newport, for that is a right not possessed by any natural person.

The right to lay gas pipe in the streets of a city is a franchise which can only be confered through the sovereign power of the State. The doctrine is thus stated by Dillon in his work on Municipal Corporations, 3rd ed, sec. 691:

"In Great Britain express legislation is necessary to warrant the laying down of gas pipes in the public highways, and so in this country it is also considered that the right to the use of public streets of a city by a gas company for the purposes of laying down its pipes is a franchise which can be granted only by the legislature or some local or municipal authority empowered to confer it." See also 180 St. Rev., 292.

It only remains to inquire whether the grant of the right to the Dueber Light Co. by the city of Newport, through its mayor and council, conferred any authority or had any efficacy. We think not. The act was void because the city of Newport had no power to make such grant, and, as we have just seen from Dillon, "no local or municipal authority" can create such a franchise until it has itself first been "empowered to confer it."

This brings us to consider the rights of the Newport Light Company.

II.

The only express power conferred upon the city of Newport by the legislature of Kentucky touching the matters in litigation was to construct, maintain, and operate gas works and to pass all ordinances necessary to regulate the same, which, of course, carried with it, under the well-known doctrine of reasonable implication, the implied authority to use the streets in laying pipe for that purpose.

It seems to be conceded that the city of Newport, having this power to construct and operate gas works and lay pipes for that purpose, could, by proper contract, employ some other person or corporation to do precisely the same thing with the same powers.

This was done with the Newport Light Co., and when it was done the power of the city of Newport over the entire subject was exhausted.

It must be borne in mind that there was no "legislative discretion" given to the city of Newport to grant the franchise of the right to lay gas pipes in the streets and to persons and corporations indiscriminately or generally.

The franchise was granted to the city of Newport to be exercised by the city and that by implication, and the only right which the city of Newport had it transferred by contract to the Newport Light Co.

We believe the rule is universal that the municipal authorities of a city cannot grant a franchise in the use of its streets for the purpose of laying or operating a street railway on the surface of the street without first having received express authority so to do from the State legislature. The tearing up of a street and laying gas pipe therein is much more inconsistent with the use to which the street was originally dedicated. In Penn. R. R. Co. *vs.* Nat. R. R. Co., 8 C. E. Gr., 441, the New Jersey Court of Appeals says, "Whether franchises are delegated by special charters or under general laws, they are emanations from the people in their sovereign capacity. What is not conferred is withheld and remains in the original source. The attempt to exercise them by individuals or companies until so conferred can be nothing but an unwarranted usurpation of power. The doctrine is rooted and grounded in the common law we inherit and equally so in public policy and public expediency."

In the celebrated and leading case of Bank of Augusta *vs.* Earle, 13 Peters, 519, the Supreme Court of the United States announce this rule in its broadest terms as applicable to every franchise. The Court says: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which 'is not derived from a law of the State."

Assuming this to be the law, there are still two objections

urged to the validity of the contract between the city of New port and the Newport Light Co. ;

First. That it creates a monopoly, and for that reason agains public policy and void.

Second. That it gives exclusive public privileges which ar not in consideration of any public service, and is therefore inter dicted by the 1st sec. of our "Bill of rights," which provide that "no man or set of men are entitled to exclusive separat public emoluments or privileges from the community but in con sideration of public services."

(1.) As to the first objection, we do not think it can b raised in these actions, because there is no applications to re strain the Dueber Light Co. from manufacturing or selling gas but only to restrain it from laying pipes in the streets and from exercising a franchise which it does not possess.

The definition of a monopoly given by Mr. Justice Field i the "Slaughter-house cases" has become standard in this coun try.

He defines it "to be an institution or allowance from the sov ereign power of the state, by grant, commission, or otherwise, t any person or corporation for the sole buying, selling, making working, or using of anything whereby any person or persons bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before or hindered in their lawfu trade."

It relates to the deprivation of right common to all men be fore the legislative grant.

It is obvious that this cannot apply to a franchise ; for, as we have seen, this is not a natural right ; it is a right which no per son or corporation has or can exercise except as the power may be given through the General Assembly of the Commonwealth.

(2.) As to whether the Newport Light Company has an ex clusive public privilege, and whether such privilege was granted in consideration of public service to be rendered the city of Newport, consistently with the Constitution, so as to make it unlawful for the State legislature hereafter to grant a similar right to any other person or corporation, it seems unnecessary to decide.

In the view taken of the law by this Court that contract is valid and exclusive, so far as the city of Newport is concerned, because it has exhausted its power over the subject, and it is al-

so exclusive as to the Dueber Light Co. because it has no rights in the premises. In fact it is exclusive as to all the world until the legislature in its sovereign power may see fit to grant the same right to somebody else, if its power also has not been exhausted.

1. This exclusively grows out of the very nature of a franchise, being a right not pre-existent, but created and exercised only in pursuance of special legislative authority in each particular case.

As said by the learned Vice-Chancellor in the case of Jersey City Gas Co. *vs.* Dwight, 29 New Jersey Equity Reports, 249—

"It must also be declared as the established law of this State that the grant of a franchise by the State is by its own intrinsic force and without express words exclusive against all persons but the State, and that any attempt to exercise like rights and privilege without legislative authority is a fraud and an unwarrantable usurpation of power."

In the same opinion the Court says, "The complainants have a right to use the public highways of Jersey City for the purpose of carrying their gas by pipes to all who want it. The defendants have no such right, but threaten to exercise it by usurpation, and thus acquire part of the complainants' business.

In this condition of affairs I do not think there can be the slightest doubt as to the duty of the Court. The right of a corporation to seek the protection of a Court of Equity against an infringement or usurpation of its franchise is a familiar rule of equity well established.

And it is equally well established that a franchise is property, which, like every other thing susceptible of private ownership, is under the protection of the law.

It might be *obiter dictum* for this Court now to determine whether the right of the Newport Light Co. is exclusive against the State. At any rate, it is not considered necessary, and the court will not follow the learned counsel on both sides in their very able investigation of the conflicting authorities upon this subject. It will be time enough to determine that question when some corporation or person authorized by the State according to the forms of law comes properly before the Court to raise it.

As the court is now advised the Dueber Light Co. has no rights

in the premises, and has, therefore, no standing in court and is entitled to no relief.

The Newport Light Co. is entitled to an injunction, as prayed, both against the Dueber Light Co. and the city of Newport.

The demurrer of the Dueber Light Co. to the answer, counter-claim and cross petition of the Newport Light Co. is overruled. The demurrer of the Newport Light Co. to the petition of the Dueber Light Co. is sustained. Let exceptions be entered for both parties.

The injunction against the city of Newport is made perpetual in the suit of the Newport Light Co. against the city of Newport.

The other action was only submitted on the demurrers.

Mess. Carlisle & Carlisle & Nelson & Washington, attorneys for Newport Light Co.; Mess. Wm. Lindsay, T. F. Hallam, Jos. C. Wright, attorneys for Dueber Light Co.; E. W. Hawkins, attorney for the city of Newport.

Chapter 653 of Acts 1889 and '90 is in the words and figures as follows, to-wit:

Chapter 653.

An act to incorporate the Edison Electric Illuminating, Heating and Power Company of Newport, Kentucky.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That T. P. Carothers, J. J. Hetsch, P. P. Eyer, H. M. Healy, John Halloran, F. R. Draddy, and William Gildehaus, their associates, successors and assigns, be, and they are hereby incorporated and created a body politic, by the name of the "Edison Electric Illuminating, Heat and Power Company of Newport, Kentucky;" and shall by such name have perpetual succession with power to sue and be sued, contract and be contracted with, including the right to purchase, hold and convey real estate; to have and use a common seal, and change and alter the same at pleasure; and generally do and perform all things necessary to be done and performed in the conduct of its business hereinafter set forth; to ordain and put in execution such by-laws, rules and regulations, for the government of its affairs, as may be deemed expedient and proper; and the same may be altered or amended at any regular or called meeting, by a majority of the stock, after a motion to that end shall have

been entered at any regular or called meeting, held not less than thirty days previous; provided, such by-laws, rules and regulations, shall not be inconsistent with the Constitution and laws of this State or of the United States.

§ 2. The capital stock of the corporation shall be fixed by the company, but shall not exceed two hundred thousand dollars, and shall be divided into shares of not more than one hundred dollars each.

The stock shall be transferable on the books of the company according to the by-laws; but the company shall hold a lien upon the shares of any stockholder who may be indebted to it, and such shares shall not be transferable without the consent of the president and directors first had, or until said debt shall have been paid and discharged.

§ 3. The corporation shall be governed by a board of seven directors, which number may be increased to nine. The directors shall be elected annually by the stockholders from their number on the first Monday of January of each year, and shall hold their office until their successors are duly elected and qualified.

The directors shall elect from their number a president and vice-president, and may elect a secretary and treasurer, who shall be stockholders in said company, and may appoint such other officers and agents as may be necessary for the proper conduct of the business and affairs of the company, and may fix their compensation, and may receive bond from any or all of them for the faithful performance of their respective duties. The incorporators above named shall act as directors until a board shall be regularly elected and qualified.

§ 4. Each one hundred dollars of stock in said company, whether in one or more shares, shall entitle the holder or holders thereof to one vote, in person or by written proxy, in all elections of officers and all meetings of said company for any purpose.

§ 5. Said corporation is hereby authorized to create an indebtedness, in such an amount as the stockholders may order, and may issue its bonds therefor, secured by lien or mortgage upon its property rights or upon all thereof.

§ 6. The private property of the members, stockholders or incorporators of the corporation, shall not be liable for corporate debts or liabilities.

§ 7. The general nature of the business of the corporation

shall be the erecting, operating and maintaining a general system of electrical dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat and power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants, and other persons and corporations, and municipal corporations, located in or near said city, with light, heat and power by the electric current.

§ 8. Said corporation is authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, lighting and heating, in, under, on and over the streets, alleys and by-ways of said city and adjacent thereto; provided it shall in no way permanently obstruct the use of the same to the public or any individual; and it is hereby required to place in repair any street or highway under which it may lay its conduits, or in which it may erect its poles, or do such other work consistent with the general nature of the business of the corporation; but it may temporarily obstruct the same.

§ 9. Work under this act shall be commenced in two years, and the work put in operation within five years from the passage of this act.

§ 10. This act shall take effect and be in force from and after its passage.

Approved April 9, 1890.

Section 6, chapter 847, of acts 1889, and '90, entitled An act to amend the charter of the city of Newport, is in the words and figures as follows, to wit:

The Board of Councilmen are hereby authorized to contract for lighting the city of Newport and its inhabitants in any mode now known or which may hereafter be discovered, and in so doing grant the use of the public places and of the streets of the city for such purposes: Provided, that said contract shall not interfere with any existing right or contract.

§ 7. All acts in conflict with this act are hereby repealed.

§ 8. This act shall take effect from and after passage.

Approved April 17, 1890.

APPENDIX "F."

Order of Commitment.

And at a court held for the said Louisville Law and Equity court on the 20th day of October, 1891—

Came the City of Newport, its mayor, and the members of the Board of Councilmen of said city, by counsel, and tenders and moves the Court for leave to file a supplemental response herein; to which Newport Light Co. objects.

The respondents, The City of Newport, A. S. Berry, mayor of said city; Wm. Cassidy, James McCracken, John Halloran, Edward Enneking, James Knoblock, B. W. Keim, Phillip J. Ryan, Jacob Smith, James Dunnigan, and John C. Wall, members of Board of Councilmen of said city of Newport, having failed and refused and still failing and refusing to comply with the order made herein on the 13th day of July, 1891, it is now ordered that all the respondents except the City of Newport be, and they are hereby, committed to the custody of the jailer of Jefferson county, to be by him confined in the jail of said county for the period of three months unless they shall before the expiration of that time comply with the said order of July 13th, 1891. It is adjudged that the Newport Light Company recover of the said defendants its costs herein expended, and therefor it may have execution.

And this proceeding is continued for such further orders as may be necessary; to all of which respondents and each of them except and pray an appeal to the Court of Appeals, which is refused by the Court.

Ordered by the Court that the execution of foregoing order be suspended until the 24th inst.

APPENDIX "G."

At the same time the Court, through Judge Pryor, delivered the following opinion herein:

Opinion of the Court of Appeals.

In the year 1885 a contract was entered into between the city of Newport and the Dueber Light Company. by which the latter was to furnish gas for lighting the city, &c., for a fixed period.

The city in the month of June in the year 1880 had made a contract with the Newport Light Company to furnish the same light to the city, and at the time of the execution of the contract between the city and the Dueber Light Company the Newport Light Company was in the actual performance of its contract. The latter obtained an injunction preventing the Dueber Light Co. and the city from disturbing the exercise of its franchise under the contract of June, 1880, and the Chancellor below rendered a judgment the substance of which was enjoining the city from making a contract with any person for lighting the streets, alleys, public buildings, etc., of the city with gas or otherwise during the continuance of the contract with the Newport Light Company. The contract with the Newport Light Company continues until the year 1904. The case was brought to this court and the judgment affirmed.

In July, 1891, the city of Newport entered into a contract with a company called the Suburban Electric Company, by which that company undertook to furnish electric lights for the streets, etc., of the city, and the Newport Light Company, conceiving that the judgment of the chancellor in the equity action against the city, and affirmed by the Court was being disregarded, obtained a rule against the mayor, the councilmen, and others to show cause why they should not be punished for contempt for violating or refusing to obey the mandate of the Chancellor. The motion on the rule was tried in the Louisville Law and Equity Court and the parties adjudged to be in contempt and ordered to jail on their refusal to annul the contract between the city and the electric light company; and the question therefore arises, can the city make any contract for lighting its streets and public places with electricity as long as the

contract for furnishing it with gas remains in force? It was held in the case brought to this Court that the Chancellor had the right to protect the Newport Light Company in the exercise of its franchise, and having expended large sums of money, with its pipes and posts laid down and erected, the city was properly enjoined from permitting the Dueber Light Company and the city from executing a like contract.

That a contract with a corporation when the right to contract existed was as inviolable as a contract made with natural persons. We think the case presented now is different in many respects from the original case between the Dueber Light Company and the city, on the one side, and the Newport Light Company, on the other. By an act approved April 17th, 1890, the Board of Councilmen was authorized to contract for lighting the city of Newport and its inhabitants in any mode now known or which may hereafter be discovered, etc., and while no legislative enactment can authorize the violation of a contract, nor does this enactment propose to do so, as it provides that existing contracts shall not be interfered with, still the growth of the city and its increase of population since the contract of June, 1880, demands that its people and the public places shall have the benefit of the improvements made in lighting large cities, and under such a state of facts the chancellor would hesitate in inflicting the punishment for contempt or even in granting an injunction when the circumstances connected with the subject-matter of the contract have been changed and the city by reason of its rapid growth and the necessities of the public require that the more recent improvements in lighting the public places should be adopted for the comfort and welfare of its people; otherwise the city would be compelled to use gas and no other light until the appellee's contract expires, which is in the year 1904.

The city, under the contract with the Newport Light Company, could not compel that company to furnish any other light than gas, and this court, in construing that contract in the case of The City of Newport *vs.* The Newport Light Company, reported in 89th Ky., held that the Newport Light Company could not enter on the streets of Newport and subject them to a new use so as to furnish electric lights without the consent of the city, indicating clearly that as to improved lights the city had to be consulted before the Newport Light Company could

use the streets for the purpose of furnishing it, and therefore the chancellor will not say that because of the original contract made in June, 1880, the city is to be deprived of electric lights unless the appellee sees proper to furnish them. Did that contract by its terms give to the Newport Light Company the unlimited power over its streets for the purpose of lighting them for the period of twenty-five years from June, 1880? We think not. The original action in this court under which the injunction was made perpetual was in reference to the supply of gas alone, and only considered in that light, and the word otherwise used in the restraining order by the judgment below can not be construed as giving to the Newport Light Company the absolute right to furnish gas and any other light during the existence of the contract.

The contract may authorize the company to furnish gas or any other light as good, still it may decline to furnish other lights or the city to receive them, as it is apparent the contract had reference to gas only, and could have been considered in no other way by either the court below or this court. The contention was as to which of the two companies should furnish gas, the Dueber Light Company or the appellee, and upon that issue the opinion of this court was rendered as found reported in 84th Ky. Now, the court of equity is asked to adjudge that no other light shall be used than gas, or, if so, that the Newport Light Company shall furnish it. The chancellor in restraining the city from making a contract with the Dueber Light Company went as far in protecting the rights of the appellee as was justified by the facts, but to go further and adjudge that no other company shall furnish light of a different character when in the judgment of the council the public interests require it would be to give the exclusive privilege to the appellee to furnish all lights necessary for the twenty-five years. The company has its legal remedy, and must resort to that remedy if it has sustained damages by reason of the refusal by the city to have its streets and public places lighted by gas. It is a right for the violation of which there is a remedy, but not to be enforced by the chancellor to the detriment of the public interests. We are not to be understood as holding that the appellee cannot retain its pipes in the streets with a view of furnishing gas to the inhabitants, but what we do hold is that a court of equity will not interfere to prevent the city from lighting the

streets and public places with electric lights, and therefore the rule against the appellants should be discharged.

There is a litigation pending in the court below by which the appellee is insisting that the city consented under the terms of the original contract that the appellee might place electric lights on the streets, etc.

This opinion is not to affect the pending litigation, as the questions involved in that case are not before us.

Reversed and remanded, with directions to discharge the rule.

Office Supreme Court U. S.
FILED.
JAN 22 1894
JAMES H. McKENNEY,
CLERK.

Brief for Plaintiff in Error, on Motions to Dismiss for Want of Jurisdiction, and to Affirm as a Delay Case.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1022.

THE NEWPORT LIGHT COMPANY,
Plaintiff in Error,

vs.

THE CITY OF NEWPORT ET AL.,
Defendants in Error.

In Error to the Court of Appeals for the State of Kentucky.

SUPREME COURT OF THE UNITED STATES.

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Plaintiff in Error,

vs.

THE CITY OF NEWPORT ET AL.,
Defendants in Error.

Brief for Plaintiff in Error, on Motions to Dismiss for Want of Jurisdiction, and to Affirm as a Delay Case.

STATEMENT OF CASE.

In an action in the Louisville Law and Equity Court, between the plaintiff in error and the defendant in error, the City of Newport, that court on the 18th of July, 1885, rendered a judgment (see pages 151 and 152 of printed Record) perpetually enjoining the said City of Newport, and its officers, agents, etc., "from making or entering into any contract with any person, company, partnership, or corporation for the lighting of the streets, lanes, alleys, public buildings,

or places of the City of Newport, with gas or otherwise, during the existence of the contract between the City of Newport and the Newport Light Company, *and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places*, in such quantities as may be required for that purpose, according to the contract between said parties, as long as said contract shall remain in force."

The Court will notice, that the important part of this judgment, which we have italicised, is omitted from the quotation made by counsel for defendants in error in their brief.

From that judgment an appeal was prosecuted to the Court of Appeals of Kentucky, and that court held, that the contract of June 3d, 1880, between the Newport Light Company and the City of Newport (page 8 of printed Record) was valid and binding, and affirmed the judgment of said Louisville Law and Equity Court.

The defendants in error having violated the injunction above quoted, the plaintiff in error on the 7th day of July, 1891, instituted this proceeding for contempt against them in said Louisville Law and Equity Court, by filing therein the affidavit of John A. Williamson (page 2 of printed Record), charging that the defendants in error had violated said order of injunction, *First*, by entering into the contract with the Electric Light Company (page 3 of printed Record), and *Second*, by passing a resolution to discontinue the taking of gas from the plaintiff in error

(same page of Record). On the filing of this affidavit, said court awarded a rule against the Mayor and Board of Councilmen to show cause.

As a defense to the rule, the defendants in error filed a response (page 16 of printed Record), claiming a novation of the original contract by the making of a new contract, by which the plaintiff in error had lost its rights secured by said judgment; and that by an act of the Kentucky Legislature incorporating the Electric Light Company; and an amendment to the charter of the City of Newport, said city was authorized to contract with the Electric Light Company for lighting its streets and public places with electricity, *and to discontinue the taking of gas from the plaintiff.*

To this response the Louisville Law and Equity Court sustained a demurrer, and required the respondents, in order to purge themselves of contempt, *First*, to annul or cancel said contract with the Electric Light Company, and *Second*, to rescind the resolution discontinuing the taking of gas.

From this judgment the defendants in error appealed to the Court of Appeals of Kentucky, and that Court held that the act incorporating the Electric Light Company, and the act of 1890, amending the charter of the City of Newport, and the resolution to discontinue the taking of gas were valid and binding, and not repugnant to the Constitution of the United States, and that defendants in error had not violated the injunction, and were not guilty of contempt, and directed the lower court to discharge the rule.

ARGUMENT.

On the Motion to Affirm.

The plaintiff in error contends that it is manifest from the record, that the writ of error was not asked for delay only.

If this court has the jurisdiction to affirm the judgment of the state court, it has the jurisdiction to re-examine and reverse it, and, although the rules of court may authorize the making of the two motions at the same time, we can not understand how the learned counsel for the defendants in error can seriously contend for both at the same time.

By the judgment complained of, the plaintiff was denied the remedy which it sought for the enforcement of a judgment which it had obtained. The judgment carried costs only, and has not been superseded. The plaintiff is delayed, and not the defendants. If the Court of Appeals had allowed the lower court to enforce obedience to its judgment or decree, the "public" might have been "delayed in the enjoyment of the fruits of invention or science by improvident or ill-advised contracts entered into by their representatives."

On the Motion to Dismiss for Want of Jurisdiction.

The plaintiff in error contends for the following propositions:

1. That this proceeding is a suit within the meaning of the act of Congress.

2. That the judgment of the state court is a final judgment.

3. That the Court of Appeals of Kentucky is the highest court of the state in which a decision in the suit could be had.

4. That the validity of the act incorporating the Electric Light Company, of the amendment to the charter of the City of Newport, and of the resolution of the city council discontinuing the taking of gas, was drawn in question in said suit on the ground of their being repugnant to the constitution.

5. That the decision of the state court is in favor of the validity of the act of incorporation, the amendment to the city charter, and the resolution of the city council.

6. That the passage of the resolution by the city council was the exercise of an authority under the state repugnant to the constitution.

7. That the spirit, meaning and intent of Section 10 of Article 1 of the Constitution of the United States is not only that the state legislature shall pass no law impairing the obligation of a contract, but

that neither of the co-ordinate departments of the state government, nor all of them combined, may do anything or omit to do anything the necessary result of which will impair such obligation; and that the order of the Court of Appeals of Kentucky directing the lower court to discharge the rule and thereby denying to the plaintiff in error the only remedy which it had to enforce obedience to the judgment which it had obtained, was the exercise of an authority under a state law, the validity of which was drawn in question in this suit on the ground of its being repugnant to the constitution within the meaning of the act of congress, and that the decision of said court was in favor of the validity of such exercise of authority, and is therefore repugnant to the constitution.

8. That the foregoing propositions are shown by the record.

Is this a Suit?

A suit is a proceeding in a court of justice, whereby a plaintiff seeks from a defendant a remedy for the enforcement of a right or the redress of a wrong.

In the case of *Weston* vs. *The City Council of Charleston*, 2 Peters, 449—By an ordinance passed by the city council of Charleston, "stock of the United States" was, among other things, made taxable. The plaintiffs, as owners of such stock, applied to the Court of Common Pleas for a writ of prohibition to restrain

the city council from taxing that stock, on the ground that the tax would be inconsistent with the constitution of the United States. The writ of prohibition was granted. The proceedings were removed to the constitutional court, which held that the tax was valid, and reversed the order of prohibition; whereupon a writ of error was brought.

One question in the case was: "Is a writ of prohibition a '*suit*'?" Held, that:

> "The term is certainly a very comprehensive one, and is understood to apply to any *proceeding* in a court of justice by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the *proceeding* by which the decision of the court is sought is a *suit*."

Every court of equity has the inherent power to enforce obedience to its orders and judgments by process of contempt. That is the law in Kentucky. (See *Kaye* vs. *Kean*, 18 B. Monroe, 844, and *Gorham* vs. *Luckett*, 6 B. Monroe, which are referred to in petition for rehearing, on page 98 of printed Record). Quoting from the opinion of the Court of Appeals, page 87, printed Record:

> "A civil contempt must usually be brought to the notice of the court by affidavit, as was done in this case, and is rather to be looked

upon as a civil proceeding for the benefit of the other party, although in name a contempt of court."

The case of *McMicken* vs. *Perrin*, 20 Howard. 133, cited by counsel for defendants, was where an appeal from the order of a Circuit Court of the United States, compelling a conveyance in execution of a decree, which had been affirmed by the Supreme Court, was dismissed upon the ground, that this involved no new question or decision, but was the ordinary means of enforcing the original decree. But the court also held that, "there are cases in which a second appeal may be taken, but it must be founded on a procedure subsequent to the original decree, and in a matter not concluded by it."

In *Callan* vs. *May*, 2 Black, 541, it was held that May, as purchaser under a decree of the Circuit Court, which had been affirmed by the Supreme Court, was entitled, as a matter of course, to the process of the court to put him in possession; and that if there was an agreement between him and Callan, whereby the land was leased to Callan for a term, which had not yet expired, such an agreement could furnish no ground for appeal from an order of the Circuit Court carrying into execution the mandate of this court in the case in which the former appeal had been taken, in which May was not a party, and had no concern; and that Callan's remedy was by bill in equity setting

out the agreement and praying that May might be enjoined from disturbing him in his possession; and although this court held, that the order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates, we submit, that it was upon the ground that May was not a party to the decree, and that courts will not permit the execution of their decrees to be interfered with by permitting a new controversy, between different parties, which might be the subject of an independent suit, to be brought into the original case.

These two cases which are cited by counsel for defendants in error, are clearly distinguishable from the case at bar, in this, that they were appeals from judgments of United States courts, taken by persons seeking to interfere with the execution of mandates of this court, and involving no new question which could be properly tried between the same parties; while the plaintiff in error in this proceeding is seeking to enforce obedience to a decree; and the controversy between the parties is as to whether the acts charged constitute violations of the order of injunction, and if so, whether the defendants should be compelled to obey the same; their excuse being, that subsequent legislation authorized the interference with the execution of the decree.

Daniels *vs.* Tearney, 102 U. S. Rep., 417.
Eureka Lake Co. *vs.* Yuba County, 116 U. S. Rep., 410.
Upshur Co. *vs.* Rich, 135 U. S. Rep., 474.

II.

That the judgment of the Court of Appeals is a final judgment we think needs no argument; but, if it does, we shall only quote from what the Court of Appeals itself has said upon this question. On the motion of plaintiff in error to dismiss the appeal of defendants in error, the Court, speaking of the judgment of the Louisville Law and Equity Court, used this language (page 85, printed Records):

> "It (the judgment) fixed the rights of the parties. It determined that the *defenses* relied upon by them were not valid. . . . . It passed upon certain alleged rights of the city, *claimed to have arisen since the judgment of* 1885 *was rendered*, and to this extent it certainly *finally determined the rights of the parties.*" (The italics are ours.)

So that this Court will see, that the ground, and the only ground, upon which the Kentucky Court of Appeals took, *or could have taken*, jurisdiction of defendants in error's appeal from the judgment of the Chancellor, requiring them to render obedience to the order of injunction, was that the judgment determined, that the defenses made by the respondents, of a *noration*, and of the amendment to its charter, and the Act incorporating the Electric Light Co., having occurred *since* the original judgment, *were not valid defenses;* and that therefore his

judgment was a *final* one, from which an appeal lay to that court. If this is true, how can it be claimed, that the judgment of the Court of Appeals, in passing upon a final judgment of a lower court, is not itself a final judgment? It seems to us this language of the Court of Appeals also establishes the proposition, that, as the response of defendant in error set up as matters of defense only, the Act incorporating the Electric Light Co., the Act amending the charter of defendant city, and the Resolution of defendant city council, matters all occurring since the original judgment, that said court was compelled to and did hold that each and all of said acts were legal and binding, and not repugnant to the Constitution of the United States.

III.

That the Kentucky Court of Appeals is the highest court in the state in which a decision in this suit could be had, is shown by the certificate of the presiding judge of the court (page 100, printed Record).

IV.

The record shows that the defendants in error in their response to the rule to show cause (page 18 of Record), set up and relied upon the act of the legislature of Kentucky, incorporating the Suburban Electric Illuminating Heating and Power Company

(page 33 of Record) and the 6th section of the act amending the charter of Newport, (page 35 of Record), which authorizes the board of councilmen "to contract for lighting the City of Newport and its inhabitants in any mode now known or which may hereafter be discovered," etc., as authorizing them (the defendents) to violate the terms of the injunction, by making the contract with the Electric Company for lighting the streets of the city with electricity, *and by passing the resolution to discontinue the taking of gas from the plaintiff*. The validity of these two acts, and of the resolution, was drawn in question on the ground of their being repugnant to the Constitution, by plaintiff's demurrer to said response (page 35 of Record). If they were valid, the response alleged a good defence to the rule. They were valid unless they impaired the obligation of the contract between the parties as interpreted and construed by the judgment of the court; or impaired plaintiff's right to enforce that obligation as established by said judgment. The impairment or denial of the remedy is the impairment or denial of the right.

The lower court held that these acts of the legislature and the resolution of the city council were invalid, and did not justify the violation of the injunction, and that its judgment should be obeyed. The Court of Appeals (see opinion, page 80 of Record,) decided in favor of the validity of said acts and resolution, and denied to the plaintiff *the only remedy* which it had for the enforcement of the rights ad-

judged to it by the decree of the chancellor, which the same Court had affirmed in 1886.

The only object and benefit of a decree is to secure a remedy for the enforcement of a right or the redress of a wrong. What good is a decree, if it may be disobeyed with impunity?

In re Chiles, 22 Wallace Rep., 157, 158.

V.

The Court of Appeals could not have decided as it did, without deciding in favor of the validity of said acts of the legislature and of the resolution of the city council.

The decision was, that the mayor and board of councilmen should not be punished for substituting electric light for gas light, by making the contract with the electric company: *and discontinuing the taking of gas.*

The effect of the decision was to impair the obligation of the contract—to take away the remedy which plaintiff would have had but for said acts of the legislature.

The main question submitted to the Court of Appeals for decision was, whether the decree of a Kentucky Court should be enforced. But we can not agree with counsel for defendants that that is a "pure and simple question of practice." A question of practice can arise only as to the meaning and scope of a rule, established by statute or under the common law, regulating similar proceedings in courts of justice. Are we to understand the counsel as contending that it is a rule of practice of Kentucky courts, not to enforce their judgments?

The only question of practice presented, or decided by the Court of Appeals in this suit was, as to whether the defendants had the right, under the Kentucky code, "Regulating Practice in Civil Cases," to prosecute an appeal to that court from the judgment of the Louisville Law and Equity Court. It was raised and decided in favor of the defendants' right to appeal, on the trial of plaintiff's preliminary motion to dismiss the appeal. For the order overruling the motion to dismiss, and the opinion delivered by the Court, see printed Record, pages 85 *et seq.* This was a question of practice under the state law. The main question in this case is not a question of practice, but of right—whether the plaintiff shall be deprived of the rights adjudged to it by the chancellor, by the denial of the remedy or all remedy for the enforcement of the decree.

The Court of Appeals, in its opinion (see page 89 of the printed Record) decided, that the additional agreement between plaintiffs in error and the City of Newport, as of March 19, 1887, was not a novation of the original contract, or of plaintiff's rights secured by the judgment. The Court also held, that the making of the Electric Light Contract was not a violation of the terms of the injunction, as construed by the Court.

Another reason given why the chancellor should not be allowed to compel obedience to his decree is stated in the opinion, as follows:

"By an act approved April 17th, 1890, the "board of councilmen was authorized to contract "for lighting the City of Newport, and its inhabi- "tants, in any mode now known or which may "hereafter be discovered, etc., and while no legis- "lative enactment can authorize the violation of a "contract, nor does this enactment propose to do so, "as it provides that existing contracts shall not be "interfered with, still, the growth of the city and "its increase of population since the contract of "June, 1880, demands that its people and the public "places shall have the benefit of the improvements "made in lighting large cities, and under such a "state of facts the chancellor would hesitate in in- "flicting the punishment for contempt, or even in "granting an injunction, when the circumstances "connected with the subject matter of the contract "have changed, and the city, by reason of its rapid "growth and the necessities of the public, require "that the more recent improvements in lighting "the public places should be adopted for the com- "fort and welfare of its people."

In delivering the opinion of the court on the original appeal, the court used this language:

"It will not be contended that the city, "through its council, can enter into such a contract "in discharge of a public duty, and then violate its "provisions at the will and pleasure of the council, "or disregard its obligation; when terms more

"favorable are offered by some other corporation." See *City of Newport* vs. *Newport Light Company*, 84th Kentucky Reports, page 176.

Under the reasoning of the court, as stated in the opinion, could the mayor and board of councilmen escape punishment for discontinuing the taking of gas light, except upon the ground that they had the right to substitute electric light? Could they substitute electric light without making the contract with the electric company? Could either party enter into that contract unless the two acts were valid? The court was compelled to decide in favor of their validity in order to excuse the defendants.

The mayor and board of councilmen had no power not granted by the state. If the original decree of the chancellor determined anything, it was that the municipal board had no power to make any other contract for lighting the streets and public places of the city; and no power to discontinue the taking of gas from the plaintiff, during the life of the contract. The Court of Appeals, in its opinion delivered on the original appeal, held that the power of the city on this subject had been exhausted. The board, in 1891, had no power to pass the resolution complained of, unless it was conferred by one or both of these legislative acts.

The language of the constitution is: "No state shall pass any law impairing the obligation of contracts." The object was 'to uphold the inviolability

of contracts once entered into by parties able to contract; and to prevent the impairment of such obligations. The mere passage of a law could not do this unless it was called into operation, and the effect of its application was to bring about the wrong intended to be prevented. The Court of Appeals held that the amendment to the city charter did not authorize the violation of the decree; but it was used to accomplish that purpose. The city could contract for electric light, in addition to gas light, if it chose to pay for both, without impairing the obligation of the contract; but if the effect is to displace gas by substituting electricity with impunity, the obligation is impaired; and it is of this act, discontinuing the use of gas, that the plaintiff in error especially complains. And this was without doubt in plain violation of our contract rights, as established and defined by the decree which we are seeking to enforce.

The passage of the resolution was "the exercise of an authority under a state."

In the case of *Weston* vs. *City Council of Charleston*, 2 Peters, 449, cited *supra*, it was held that the passage of a city ordinance was the exercise of an authority under the state, within the meaning of the Judiciary Act of 1789.

See *New Orleans Gas Co.* vs. *Louisiana Light Co.*, 115 U. S., 650, and *New Orleans Water Works Co.* vs. *Rivers*, 115 U. S., 674.

Is the act of a municipal body "*an authority exercised under the state?*"

Louisville Gas Co. *vs.* Citizens' Gas Co., 115 U. S. Rep., 683.

All city governments are the creatures of the State, derive all their powers from the State, and can exercise no power not delegated by the State.

The passage of the resolution complained of was the passage of a law by the state, whether it was passed by the legislature or by a subordinate law-making power of the state.

If the two acts of the legislature above referred to, or either of them, authorized the city council to pass this resolution, then said act, or acts, violated the constitution.

To illustrate:

Suppose there had been no act incorporating the Electric Light Company; and no amendment to the city charter, could it be contended that the city council had the power to pass this resolution?

Or, suppose the legislature itself had passed an act empowering the city council to discontinue taking gas from plaintiff, could it be argued that this legislation was not in conflict with the constitution?

Then, can the legislature do by indirection, that which it can not do by direct means?

Will this court exercise jurisdiction where an act of the legislature impairs the obligation of a contract, and refuse jurisdiction where the act of the creature of the legislature does the same thing?

The act of congress gives to this Court the power to revise the decisions of state courts in any case, either where an act of the legislature impairs the

obligation of a contract, or where "*an authority exercised under the state*" impairs such obligation.

Respectfully submitted,

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